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Fiscal Year 2006 Annual Report on the Operations and Accomplishments of the Office of the General Counsel

Equal Employment Opportunity Counsel

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Abstract

[Excerpt] The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to give litigation authority to the Equal Employment Opportunity Commission and provide for a General Counsel, appointed by the President and confirmed by the Senate for 4-year term, with responsibility for conducting the Commission's litigation program. Following transfer of enforcement functions from the U.S. Department of Labor to the Commission under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). With the enactment of the Americans with Disabilities Act of 1990 (ADA), the General Counsel became responsible for conducting Commission litigation under the employment provisions of that statute (Title I; effective July 1992).

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes that EEOC is charged with enforcing. Under Title VII and the ADA, the Commission can sue nongovernmental employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees) and the EPA (no employee minimum) includes state and local governmental employers as well as private employers. Title VII, the ADA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate that statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees, and provides legal advice to the agency on employment-related matters.

Keywords

EEOC, general counsel, annual report, employment discrimination, age discrimination, litigation

Comments

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I. Structure and Function of the Office of General Counsel

A. *Mission of the Office of General Counsel*

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to give litigation authority to the Equal Employment Opportunity Commission and provide for a General Counsel, appointed by the President and confirmed by the Senate for 4-year term, with responsibility for conducting the Commission's litigation program. Following transfer of enforcement functions from the U.S. Department of Labor to the Commission under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). With the enactment of the Americans with Disabilities Act of 1990 (ADA), the General Counsel became responsible for conducting Commission litigation under the employment provisions of that statute (Title I; effective July 1992).

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes that EEOC is charged with enforcing. Under Title VII and the ADA, the Commission can sue nongovernmental employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees) and the EPA (no employee minimum) includes state and local governmental employers as well as private employers. Title VII, the ADA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate that statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees, and provides legal advice to the agency on employment-related matters.

B. *Headquarters Programs and Functions*

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all the components of OGC, including district office legal units. The General Counsel recommends cases for litigation to the Commission and approves other cases for filing under authority delegated to the General Counsel under the Commission's 1996 National Enforcement Plan. The General Counsel also reports regularly to the Commission on litigation activities, including issues raised in litigation which may affect Commission policy, and advises the Chair and Commissioners on agency policies and other matters affecting the enforcement of the statutes within the Commission's authority.

2. Deputy General Counsel

The Deputy General Counsel serves as the alter ego of the General Counsel and as such is charged with the daily operations of OGC. The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including overseeing the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the agency's district offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of district office legal units into the investigative enforcement structure of the district offices. LMS staff provide direct litigation assistance to district offices as needed, draft guidance (including maintaining the *Regional Attorneys' Manual*), develop training programs and materials, and collect and create litigation practice materials. LMS also has an assistant general counsel for technology responsible for providing technical guidance and oversight to OGC headquarters and district offices on the use of technology in litigation and the development of OGC's computer systems. LMS and OFP staff make joint visits to district offices to provide technical assistance regarding the integration of the district legal and investigative units.

4. Internal Litigation Services

Internal Litigation Services represents the Commission and its officials on administrative claims and litigation brought by Commission applicants and employees, and provides legal advice to the Commission and agency management on employment-related matters.

5. Litigation Advisory Services

Litigation Advisory Services (LAS) evaluates district office suit recommendations in cases that require General Counsel or Commission authorization, and drafts litigation recommendations to the General Counsel for approval or submission to the Commission. LAS responds to Commissioner inquiries on cases under consideration for litigation, acting as OGC's liaison and contact point between the Commissioners and the district office legal units. LAS also performs special assignments as requested by the General Counsel.

6. Appellate Services

Appellate Services (AS) is responsible for conducting all appellate litigation where the Commission is a party. AS also participates as amicus curiae, as approved by the Commission, in United States courts of appeals, as well as federal district courts and state courts, in cases involving novel issues or developing areas of the law. AS represents the Commission in the United States Supreme Court through the Office of the Solicitor General. AS also makes recommendations to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes

the Commission enforces. In addition, AS reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Commission's Office of Legal Counsel, prior to their issuance by the agency.

7. Research and Analytic Services

Research and Analytic Services (RAS) provides expert and analytical services for cases in litigation, assists EEOC attorneys in obtaining expert services from outside the agency, and provides technical support to field staff investigating charges of discrimination. RAS has a professional staff with backgrounds and advanced degrees in the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.

8. Administrative and Technical Services Staff

OGC's Administrative and Technical Services Staff (ATSS) provides administrative and technical services to all headquarters components of OGC. ATSS also is responsible for preparing the OGC budget request to the EEOC Chair for submission to the Office of Management and Budget and Congress as well as for handling various budget execution duties such as transferring funds to district offices and monitoring expenditures. ATSS maintains nationwide data on the Commission's litigation activities.

C. *District Office Legal Units*

District office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to district office staff responsible for investigating charges of discrimination. District office attorney staff also participate in outreach efforts, and in most offices the legal unit is responsible for responding to Freedom of Information Act requests. Legal units are under the direction of regional attorneys, who manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel.

II. Summary of Fiscal Year 2006 Accomplishments

A. *Introduction: A Year of Change*

In fiscal year 2006 the Office of General Counsel implemented organizational changes in its field and headquarters operations as a result of two major Commission initiatives. These agency-wide initiatives repositioned the Commission's field office structure and revamped the systemic program, with significant implications for the agency's litigation program. In this section of the Annual Report, we summarize the changes made by these initiatives as they affected the Office of General Counsel's operations and structure.

Throughout the year, we maintained our focus on law enforcement as we filed 371 new lawsuits and resolved 383 cases for a total monetary recovery of more than $44 million. Our litigation activities encompassed a wide range of issues and obtained relief for victims of employment discrimination under all of the federal statutes we are charged with enforcing. To evaluate the scope and success of these activities, we conducted, for the first time, a review of the Commission's litigation outcomes in the trial courts, as compared to outcomes in privately litigated employment discrimination cases; and we compiled statistics on our appellate court outcomes in preparation for a similar comparative review of our work at the appellate level. We also examined the coverage of our docket by statutory basis. In section II.B. below, we present the findings of these new studies, which looked at data from fiscal years 2002 through 2006, before summarizing trial and appellate litigation activity and accomplishments in particular cases this fiscal year.

1. Field Repositioning

The EEOC's field repositioning occurred in January 2006 when the agency implemented the plan approved by the Commission on July 8, 2005, to realign the geographical boundaries and management hierarchy of its field offices, in order to provide better service to the public. Before repositioning, the EEOC maintained a field structure, largely unchanged since 1979, comprised of 23 district offices and one field office all reporting to agency headquarters. Within the districts' jurisdictions were smaller area and local offices.

The 2005 repositioning plan consolidated some offices, expanded spheres of managerial authority, and moved the agency to a field structure comprised, at the top level, of 15 districts instead of 23. The plan realigned jurisdictional boundaries and reclassified offices based on factors including workload, demographic shifts, and geographic considerations. It retained all existing Commission locations in the field and added two new offices in Mobile, Alabama, and Las Vegas, Nevada, bringing the agency to a total of 53 offices throughout the nation. Each of the 15 district offices is headed by a district director and regional attorney. The regional attorneys, who are appointed pursuant to section 705 of Title VII, 42 U.S.C. § 2000e-4, are responsible for conducting litigation within the district and report to the General Counsel.

The field repositioning plan marked the first significant reorganization of the agency's field structure since the 1970s. In 1972, Congress gave the EEOC authority to file enforcement lawsuits. Under the original structure of EEOC's litigation program, Commission suits were brought by attorneys assigned to five regional litigation centers, each headed by a regional attorney. In 1979, the litigation centers were dissolved and regional attorneys were assigned to district offices to enable them to work more closely with investigative staff in developing litigation. The number of district offices had grown to 23 by the early 1980s. In 1999, trial attorneys were deployed to all area and some local offices to provide better support to investigative staff in those offices.

As a result of the 2005 field repositioning plan, the Commission now has 15 regional attorneys in the reconfigured district office structure. Under the direction of the General Counsel, the regional attorneys oversee approximately 185 attorneys, who are based in the district and field offices and in most of the area and local offices. There was no reduction-in-force or downgrading of staff as a result of repositioning. Former regional attorneys in the offices that were reclassified from a district to a field or area office became associate regional attorneys, reporting to a district office.

Field repositioning is expected to increase efficiency of operations and enable the agency to devote more of its resources to front-line staff, including trial attorneys, mediators, and investigators, who provide direct service to the public. As before, the agency continues to maintain the capacity to staff and conduct litigation in any federal district court jurisdiction where suit may be brought under our statutes. Attorneys in the field also advise and assist Commission enforcement staff in all offices in the investigation and voluntary resolution of charges prior to litigation.

2. Systemic Initiative

In fiscal year 2006 the Commission also acted to revitalize its systemic enforcement program. The Commission's objective was to strengthen and modernize its nationwide approach to identifying, investigating and litigating systemic cases. In April 2006, the Commission unanimously adopted the recommendations of an internal task force led by then-Commissioner Leslie E. Silverman, who became Vice Chair later in the year. The task force report defines systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."

The task force, which included a regional attorney and two representatives from headquarters Office of General Counsel, as well as individuals from other Commission offices, had worked for more than a year making a comprehensive study of the history, purposes, and operations of the Commission's systemic program. The task force report made recommendations for improving all aspects of the agency's systemic work, stating that "combating systemic discrimination should be a top priority at EEOC and an intrinsic, ongoing part of the agency's daily work."

All recommendations were adopted by the Commission. The recommendations pertinent to the Office of General Counsel included the following:

- Systemic investigations and litigation will be conducted in the field, and the systemic investigation and litigation units in Headquarters will be eliminated.
- Each district in the field must develop systemic plans to ensure that the Commission is identifying and investigating systemic discrimination in a coordinated, strategic, and effective agency-wide manner.
- The Office of General Counsel should facilitate the staffing of systemic cases using a national law firm model, whereby cases are staffed with employees who have the experience and expertise needed in each particular case.

The full task force report is available at www.eeoc.gov/abouteeoc/task_reports/systemic.html.

In the second half of the fiscal year, the Office of General Counsel began implementing these recommendations by issuing a series of directives jointly with the Office of Field Programs. These directives instructed the field to submit district office systemic plans by September 2006 for headquarters review, with implementation of the final plans to begin at the start of calendar year 2007. Guidance was also provided on preparing recommendations for Commissioner charges and initiating directed investigations; identifying class allegations at the intake of charges; and ensuring collaboration between enforcement and legal units in the development of systemic charges. Enhancements to data collection and information technology systems were also begun.

In accordance with the Commission vote, the agency disbanded the Systemic Litigation Services and Systemic Investigations and Review units in headquarters, moving their small staffs of attorneys and investigators to other positions commensurate with their skills and experience. (The configuration of all other units within the Office of General Counsel's headquarters operations remained the same, and is set forth in Section I above.) As the task force report recognized, it had been the case for many years that almost all systemic litigation was being initiated and conducted by field offices. The task force concluded that a separate national systemic office was not necessary because the field can perform this work as well, or better. Field offices are connected to the pipeline of charges, and field employees are more knowledgeable about local conditions and issues, have closer ties to community groups, and have more opportunity to learn about potential systemic discrimination through the intake and the investigation of other charges. The Commission adopted the task force's recommendation to have all systemic investigation and litigation based in the field.

To prepare for full implementation of the systemic initiative in January 2007, regional attorneys focused on identifying potential systemic litigation cases, coordinating regional and nationwide cases across district boundaries, providing training on systemic issues, and working with the district directors to prepare office systemic plans. The field legal units also continued the vigorous litigation of existing systemic cases in their pending dockets, and accomplishments in these cases are set forth in succeeding portions of this report.

B. *Review of Litigation Results and Docket Content*

1. Review of Results in EEOC Suits Compared to Private Suits

For several years, the EEOC has attained the goal set forth in its Strategic Plan of maintaining at least a 90% success rate in lawsuit resolutions. (This performance measure is detailed in the agency's Performance and Accountability Report (PAR), available at http://www.eeoc.gov/abouteeoc/plan/par/2006/index.html.) Because the majority of lawsuits are resolved through settlement, this performance measure does not describe EEOC's results in cases adjudicated by a judge or jury. This fiscal year, the Office of

General Counsel conducted a review of the cases adjudicated to final decision by a judge or jury over the past 5 years, from FY 2002 through FY 2006. We also reviewed the results for private plaintiffs represented by counsel in employment discrimination cases adjudicated by a judge or jury in the federal courts, using data compiled by the Administrative Office of the United States Courts and made available through the Inter-American Consortium for Political and Social Research. The methodology used in our review largely parallels a private study on the success of employment discrimination plaintiffs in federal court.*

Our review focused on the results for two separate types of outcomes, both at the district court level: 1) nontrial adjudications (i.e., cases resolved by court orders such as summary judgment and dismissals), and 2) trial results.

Our review showed that:

- For private plaintiffs represented by counsel, 14.4% of all case resolutions were losses through nontrial adjudications; for EEOC, 5.6% of all case resolutions were losses through nontrial adjudications. (These figures treat voluntary dismissals with prejudice as settlements for private plaintiffs, because that is how most private settlements occur, but as nontrial adjudication losses for EEOC, because the agency never settles out of court. Thus, because some voluntary dismissals of private plaintiff suits will be due to lack of evidence rather than to settlements, a fully comparable nontrial adjudication loss figure for private plaintiffs would be somewhat higher than 14.4%.)
- In cases decided at trial, private plaintiffs who were represented by counsel won 40.4% of all trials; the EEOC won 45.5% of all trials.

The table below illustrates the results of our review in more detail.

Comparison of Success Rates in U.S. District Courts, Private Federal Employment Discrimination Cases to EEOC Enforcement Suits		
	Federal employment discrimination cases w/ represented plaintiffs excluding U.S. as plaintiff (2001-2005)	EEOC enforcement suits (FY 2002-2006)
Nontrial adjudications lost by plaintiff as a percentage of all case resolutions	14.4% (11,106/77,322)	5.6% (77/1,379)
Trial wins for plaintiff as a percentage of all trials	40.4% (1,115/2,759)	45.5% (20/44)

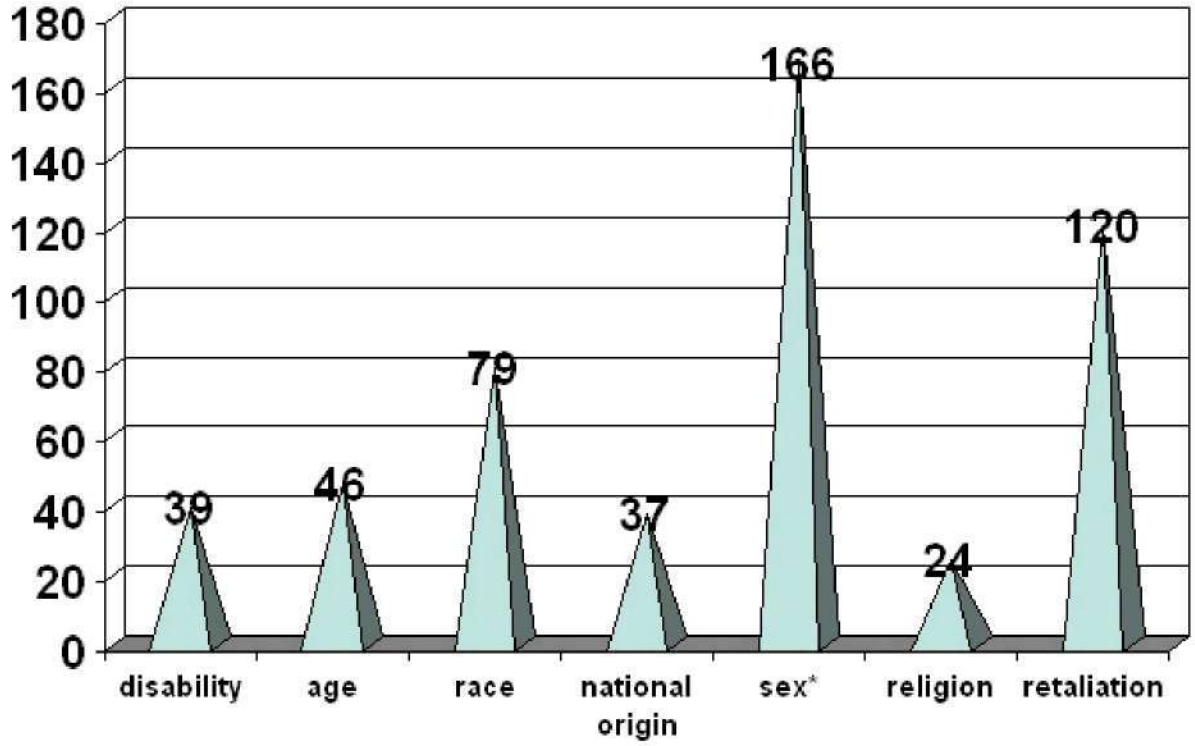
This review is intended to provide context for the data on EEOC litigation results. It is not intended to represent that the differences in results are statistically significant, and it attempts no judgment on the reasons for the different outcomes.

In the future, we plan to perform a similar comparative review of data at the appellate court level, focusing on the reversal rate for plaintiff wins and the reversal rate for defendant wins. Our internal data shows that in EEOC cases where there was a decisive outcome on appeal in the period from FY 2002 to FY 2006:

- An appellate court reversed or remanded EEOC wins in 2 out of 9 cases.
- An appellate court reversed defendant wins in 15 out of 26 appeals in cases brought by EEOC.

2. Review of EEOC Litigation Docket by Selected Statutory Bases

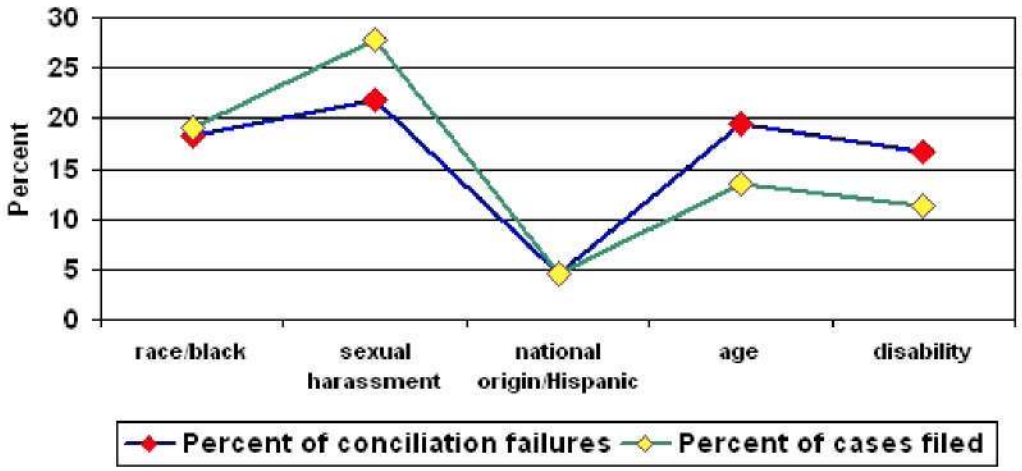
We also reviewed the content of our litigation docket in fiscal year 2006 to determine whether our case filings were representative of the categories of claims we are charged with enforcing. To maintain a balanced litigation program, we seek to enforce the law actively with respect to each of the categories protected by the statutes under our charge. The figure below illustrates the number of cases filed in fiscal year 2006 containing allegations with respect to each of the protected categories for which we have litigation authority. (Note that the total number of allegations represented in this chart exceeds the total number of cases filed because many cases contain multiple allegations. Refer to www.eeoc.gov for additional statistics on suit filings and resolutions.)



*Of these 166 sex discrimination suits, 102 suits contained claims of sexual harassment.

Because of statutory prerequisites for our litigation, a further analysis is necessary to evaluate our case-selection decisions. Under Title VII, the ADA, and the ADEA, the EEOC must make efforts to resolve violations through informal conciliation before filing suit. For those statutes, only cases in which conciliation efforts have failed comprise the pool of potential litigation vehicles for the Commission. We looked at the number of conciliation failures in some typical categories of our litigation to determine whether our suit filings were reflective of the pool of available cases. We focused on five representative types of cases subject to a conciliation requirement: race/black, sexual harassment, national origin/ Hispanic, age and disability. We calculated the percentage of each type of case filed compared to the total number of suits filed and also calculated the percentage of conciliation failures under each of these case-types compared to all conciliation failures (using FY 2006 data).

The figure below illustrates these comparisons:



This review reveals that our selection of race/black and national origin/Hispanic cases for litigation slightly exceeded their respective share of the cases available to consider for litigation after conciliation efforts failed. That is, the percent of suits filed on national origin/Hispanic (4.6%) and race/black charges (19.1%) slightly exceeded the percent of conciliation failures for national origin/Hispanic and race/black charges (4.5% and 18.3%, respectively). Our selection of sexual harassment cases for litigation (27.8%) exceeded the percentage of these charges available for litigation (21.8%), but we noted that most of our sexual harassment cases achieve a high impact by seeking relief for multiple victims of discrimination. Our selection of age (13.5%) and disability (11.3%) cases for litigation was somewhat lower than the availability of these cases for litigation (19.4% and 16.6%, respectively). Overall, these results demonstrate that we are maintaining a docket that is reasonably representative of the categories of claims we are charged with enforcing. We intend to update this examination on a regular basis.

C. *Summary of District Court Litigation Activity*

OGC resolved 383 merits suits in fiscal year 2006. Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and suits to enforce administrative settlements. These resolutions resulted in monetary relief of $44,273,829.

The 383 FY 2006 resolutions had the following characteristics:

- 295 contained claims under Title VII (77.0%)
- 50 contained claims under the ADA (13.1%)
- 50 contained claims under the ADEA (13.1%)
- 8 contained claims under the EPA (2.1%)
- 137 cases resulted in relief for multiple aggrieved individuals (35.7%)

The above claims exceed the number of suits resolved because cases sometimes contain claims under more than one statute. There were 17 of these "concurrent" suits among the FY 2006 resolutions.

OGC filed 371 merits suits in FY 2006. Of the suits filed, 369 were direct suits and 2 were actions to enforce conciliation agreements. OGC also filed 32 actions to enforce subpoenas issued during EEOC investigations.

These 371 suit filings had the following characteristics:

- 294 contained claims under Title VII (79.2%)
- 42 contained claims under the ADA (11.3%)
- 50 contained claims under the ADEA (13.5%)
- 10 contained claims under the EPA (2.7%)
- 137 cases sought relief for multiple aggrieved individuals (36.9%)
- 22 were concurrent suits (5.9%)

Section III of the Annual Report contains detailed statistical information on OGC's FY 2006 litigation activities, as well as summary information for past years.

D. *Appellate Court Litigation*

OGC's appellate litigation program is the agency's primary vehicle of law development. Practicing before the federal courts of appeals of all circuits, in the Supreme Court in conjunction with the Solicitor General's Office of the Department of Justice, and on occasion in federal district courts and state courts, OGC appellate attorneys handle Commission cases on appeal and appear as amicus curiae in private actions as approved by the Commission. Handling Commission cases involves review of the record of proceedings below and, in cases where the Commission lost below, advancing an independent analysis of the likelihood of success on appeal in a recommendation to the General Counsel. This year appellate lawyers prepared 48 briefs on appeal in Commission cases. Appellate also reviewed over 2,000 district court decisions in private lawsuits filed under our statutes and prepared recommendations for participation as

amicus curiae in 21 cases raising novel or important issues under the statutes. The Commission approved all of these recommendations. In this section of the Annual Report, we highlight significant appellate cases decided or briefed during fiscal year 2006.

1. Coverage and Administrative Prerequisites to Suit

Arbaugh v. Y&H Corporation, 540 U.S. 500 (S. Ct. Feb. 22, 2006)

The Supreme Court, agreeing with the position of the Commission as amicus curiae, held that the question of whether a defendant meets the 15-employee requirement for employer status under Title VII does not affect the district court's jurisdiction, but rather goes to the merits of the plaintiff's claims. In this case, the court of appeals held that, because the 15-employee limit is jurisdictional, the defendant could raise the defense that it lacked 15 employees for the first time after a jury rendered a verdict for the plaintiff. In an 8-0 decision, with Justice Alito not participating, the Supreme Court reversed and held instead that the defendant's argument with respect to the number of employees was a defense to liability which could be waived if not timely raised in the trial court.

EEOC v. Sidley Austin LLP, 437 F.3d 695 (7th Cir. Feb. 17, 2006)

In this ADEA case, the Commission alleged that Sidley Austin LLP, a large international law firm, demoted 32 lawyers from "partner" to "senior counsel" or "counsel" because of their age, and maintained an age-based mandatory retirement policy. In a motion for partial summary judgment, Sidley argued that the EEOC cannot obtain monetary relief on behalf of individuals who failed to file timely administrative charges under the ADEA and thus are barred from bringing their own lawsuits. The district court denied Sidley's motion, but subsequently certified the question for immediate appeal to the court of appeals. The Seventh Circuit affirmed the district court's ruling, agreeing with the Commission that the agency may obtain monetary relief for individuals who are procedurally barred from suing for such relief themselves.

Shikles v. Sprint/United Mgt. Co., 426 F.3d 1304 (10th Cir. Oct. 20, 2005)

The Court of Appeals for the Tenth Circuit held that in order to exhaust his administrative remedies, an ADEA claimant must cooperate with the EEOC during the processing of his charge, and that administrative exhaustion is a jurisdictional prerequisite to suit under the ADEA. The panel added, however, that compliance must be judged by commonsense standards, and "[p]erfect cooperation" is not required. Rather, "only when a plaintiff's non-cooperation effectively prevents the EEOC's investigation and conclusion [sic] efforts such that the EEOC proceeding essentially becomes a sham or meaningless proceeding" will a charging party's noncooperation "amount to a failure to exhaust administrative remedies." The panel then applied that standard in this case and held that the plaintiff whose ADEA charge was dismissed because he failed to provide information to EEOC and to appear or be available for an interview had failed to exhaust his administrative remedies. In so doing, the panel rejected EEOC's argument as amicus

curiae that, having filed a timely charge and brought his lawsuit within 90 days of receiving a notice of right to sue, the plaintiff had satisfied all of the procedural prerequisites to suit under the ADEA.

Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. July 28, 2006)

In this Title VII case involving a claim by a 16-year-old that she was sexually harassed while at work and subjected to statutory rape by a shift manager at his apartment, the district court entered summary judgment in favor of the employer on several grounds. On appeal to the Court of Appeals for the Seventh Circuit, the Commission participated as amicus curiae to address the district court's ruling that the plaintiff had failed to exhaust her administrative remedies. The district court had ruled that a plaintiff must cooperate with the EEOC to meet the exhaustion requirement, and that this plaintiff had not cooperated because she had not complied with EEOC's requests that she appear for an interview with an EEOC investigator. The EEOC dismissed her charge, and she brought a timely lawsuit. In its amicus brief, the Commission argued that the court's ruling was based on an exhaustion requirement that is not found in the statute or supported by the Commission's regulations. The only prerequisites to filing a Title VII suit are the filing of a timely charge, receipt of a right to sue notice, and the filing of a lawsuit within 90 days of receipt of the right to sue notice. The court of appeals agreed, endorsing the Commission's position that cooperation with the EEOC is not a precondition to filing suit against a private employer.

On the merits, on which the Commission did not participate, the court ruled that when evaluating the "welcomeness" of sexual intercourse under Title VII harassment law, the state law "age of consent" should govern when the victim is a minor. If the harassment victim is below the age of consent, as this plaintiff was, she cannot have "welcomed" the sexual encounter, and thus any actual consent or voluntary participation cannot be a defense to employer liability, but may affect damages. The court also said the shift manager's conduct was work-related even though some of it occurred at his apartment, because it involved "an episode in a relationship that began and grew in the workplace." Additionally, the court expanded the Title VII definition of "supervisor," finding that the shift supervisor, although lacking the authority to fire employees, could nonetheless be considered a supervisor for a number of reasons, including that he was often the only supervisory employee present at the store. But even if he were not a supervisor from whom liability could be imputed, the court ruled that an employer of teenagers must exercise greater care than is required in a case of routine harassment by a coworker, noting that the employer "acts at his peril if he fails to warn their parents when he knows or should know that their children are at substantial risk of statutory rape by an older, male shift supervisor in circumstances constituting workplace harassment."

Howard v. InTown Suites Management, No. 06-12270 (11th Cir.), brief as amicus curiae filed July 6, 2006

The Commission filed a brief as amicus curiae in support of the timeliness of a charge of discrimination filed by Alex Howard, an African American man, who had applied for a

job as a property manager with InTown Suites in 2001. He was interviewed by Area Manager Diane Cantu, who indicated that he would be called back again. But Howard never received a callback, and when he saw a similar job advertised a few months later he wondered why the selectee had not worked out but never suspected that he had been a victim of discrimination. In 2003, Cantu's lawyer contacted Howard to determine if he would be a witness in a retaliation suit Cantu had filed against InTown. At that time, Howard learned that InTown had a policy against hiring African Americans as property managers, which was enforced against Howard in 2001. Howard immediately filed an EEOC charge and obtained a notice of right to sue. He filed a race discrimination suit against InTown.

The district court granted InTown's motion for summary judgment on the ground that Howard's charge, which was filed more than 180 days after the decision not to hire him, was untimely. The court held that Howard was not entitled to equitable tolling because he failed to exercise due diligence by calling InTown and requesting the race of the selectee. In the court's view, if Howard had known the selectee was Caucasian, he would have had sufficient notice that he was a victim of discrimination. In its brief, the Commission argued that the district court improperly applied the Eleventh Circuit's standards for equitable tolling by requiring the plaintiff to establish employer misconduct in addition to showing he could not reasonably be assumed to have had knowledge of the alleged discriminatory act. The plaintiff's charge should be considered timely because he filed it as soon as he knew or should have known he was a victim of discrimination, the Commission argued. A decision had not been issued as of the date of this report.

Also see *Tademy v. Union Pacific Corp.* discussed in Section II.D.5. below.

2. Challenges to EEOC Investigative Authority

EEOC v. Technocrest Systems, 448 F.3d 1035 (8th Cir. May 26, 2006)

The EEOC received charges from six individuals, who asserted that they are of Filipino national origin and work for Technocrest as field service representatives (FSRs) repairing computers. The charging parties alleged that because of their Filipino national origin they were paid less than promised, subjected to intimidation, and treated less favorably as to other terms and conditions of employment. The charges also alleged that Filipinos as a class were discriminated against in these ways because of their national origin. Technocrest appealed from a district court decision in a subpoena enforcement action that ordered Technocrest to provide work history information, DOL and INS documents, and personnel files for the six charging parties, and work history information in a spreadsheet for the other FSRs. The EEOC cross-appealed challenging the district court's order insofar as it denied enforcement of the subpoena with respect to DOL and INS documents and personnel files for all employees. The Eighth Circuit affirmed the district court's order insofar as the order enforced the subpoena, and reversed that portion of the order quashing EEOC's request for DOL and INS documents and personnel file for all employees. The court of appeals concluded that the information requested in the subpoena was relevant, and rejected Technocrest's argument that EEOC was acting in

bad faith because the six charging parties could not establish a prima facie case of national origin discrimination where all the company's FSRs were Filipinos.

3. Summary Judgment Evidentiary Standards

Paz v. Wauconda Healthcare & Rehabilitation Centre, 464 F.3d 659 (7th Cir. Sept. 19, 2006)

The Commission filed a brief as amicus curiae in the Court of Appeals for the Seventh Circuit to address questions relating to the sufficiency of evidence to defeat summary judgment. The plaintiff had alleged that her supervisor fired her based on her national origin, her pregnancy, and in retaliation for complaints of discrimination. She testified that her supervisor said, "You're fired," and sent her home. The supervisor denied telling the plaintiff that she was fired. The district court granted summary judgment to the employer, on the ground that the plaintiff had not actually been fired. The Commission's brief argued that a jury could find that the plaintiff reasonably relied on her supervisor's apparent authority, regardless of whether the supervisor had actual authority to fire her, and that the circumstantial evidence would permit a jury to conclude that the plaintiff was fired and that the reason for her termination was illegal discrimination and/or retaliation. The Commission further argued that a Title VII plaintiff may defeat summary judgment with her own deposition testimony where that testimony relies on her personal knowledge and consists of affirmative evidence rather than conclusory, self-serving statements.

The court of appeals held that plaintiff's deposition testimony and other evidence (timesheets, work schedules, and coworker testimony) raised genuine issues of material fact as to whether the plaintiff had been terminated or abandoned her job, and that the plaintiff had provided sufficient direct and circumstantial evidence to show an inference of intentional discrimination without resorting to the *McDonnell-Douglas* burden shifting test

4. Sex Discrimination and Sexual Harassment

Miles v. Dell, Inc., 429 F.3d 480 (4th Cir. Nov. 22, 2005)

The Fourth Circuit Court of Appeals affirmed in part and vacated in part the district court decision granting summary judgment to the defendant on the plaintiff's Title VII claims. The district court held that the plaintiff could not establish a prima facie case of sex discrimination or pregnancy discrimination because she was replaced by a woman. Agreeing with the position taken by the Commission as amicus curiae, the court of appeals held that a plaintiff may establish a prima facie case of discrimination even if she was not replaced by someone outside the protected class if the person who hired the plaintiff's replacement is not the same as the person who decided to fire her. The court also agreed with the Commission's position that, with respect to plaintiff's pregnancy claim, she was replaced by someone outside the protected class because the woman who replaced her was not pregnant. The court of appeals, however, affirmed the district court's grant of summary judgment on plaintiff's retaliation claim, rejecting the

Commission's position that even though plaintiff had not checked the retaliation box on the EEOC charge form, her claim that she was discharged for complaining of sex discrimination was reasonably related to the allegations in the charge.

Schiano v. Quality Payroll Systems, No. 05-4115, 445 F.3d 597 (2d Cir. Apr. 24, 2006

The Second Circuit Court of Appeals vacated the district court's decision granting summary judgment to the defendant on the plaintiff's Title VII and state law claims alleging that she was subjected to a hostile work environment based on her sex. The district court had held that the standard for an actionable hostile work environment is "demanding," and that the conduct at issue must be "extreme," ruling that occasional teasing, sexual innuendo, and other inappropriate behavior, even including physical contact, was not actionable. In reversing, the court of appeals agreed with the position taken by the Commission as amicus curiae, and held that the evidence was sufficient to support a finding that the harassment of the plaintiff was sufficiently severe or pervasive to alter the terms and conditions of her employment. The district court erred by examining each factor that the Supreme Court outlined in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993), in isolation, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," comparing and contrasting its presence in Schiano's allegations with the fact patterns from other cases. The appellate court said that prior cases in which a hostile work environment was found do not establish a baseline that subsequent plaintiffs must reach in order to prevail. The court emphasized that it is precisely the "indistinct" nature of the "line between boorish and inappropriate behavior and actionable sexual harassment" that counsels in favor of allowing juries, rather than judges, to resolve such issues.

Also see *Doe v. Oberweis Dairy* discussed in Section II.D.1. above.

5. Race Discrimination and Racial Harassment

EEOC v. Target Corporation, 460 F.3d 946 (7th Cir. Aug. 23, 2006)

The Commission alleged that Target Corporation discriminated against African Americans in hiring for Executive Team Leader (ETL) positions and destroyed resumes, interview notes, and other documents in violation of recordkeeping regulations. Three applicants, Kalisha White, Ralpheal Edgeston, and Cherise Brown-Easley, submitted resumes and were told to call the store manager for an interview. But when they called the store manager, who had reviewed their resumes, he told them that he did not have time to interview them. Kalisha White, who is African American, became suspicious that race was a factor when she found out that Edgeston and Brown-Easley, who were also African American, had also been denied interviews. To test her theory, White submitted essentially the same resume under the fictitious name "Sarah Brucker" and had a friend, who is white, call using this name. The store manager scheduled an interview with "Sarah Brucker" even though he had told Kalisha White only minutes before that he was too

busy to schedule an interview with her. Another African American applicant, James Daniels, was rejected because he assertedly did not meet the requirements of the ETL position. The district court granted summary judgment to Target on all of the Commission's claims. The court credited Target's assertion that its store manager did not interview the African American applicants because he was too busy managing his store to properly perform his recruiter duties. The court characterized him as an "equal opportunity bungler" who the evidence showed did not know the race of the applicants, and concluded that the Commission had failed to present evidence that this excuse was pretextual. On the recordkeeping claim, the court found that Target's current record retention practices complied with the law and that EEOC had not presented evidence that Target's prior destruction of documents was in bad faith.

In a unanimous decision, a three-judge panel of the Seventh Circuit Court of Appeals reversed the district court's decision and remanded the case for trial. On the recordkeeping claim, the appellate court held that a reasonable finder of fact could conclude that Target's remedial efforts regarding its recordkeeping practices were insufficient to ensure that violations would not continue in the future. The court also held that there was a factual issue as to whether Target had destroyed documents in bad faith. On Daniels' claim, the court agreed with the Commission that Target had failed to meet its burden to articulate a legitimate, nondiscriminatory reason for its rejection of his candidacy when it stated that Daniels "did not meet the requirements" of the position. The court said the employer must explain its claimed reason clearly enough to allow the plaintiff to identify the kind of evidence it must present to demonstrate that the reason is a pretext. The court recognized that an employer may have a subjective reason for its decision, but it must nevertheless explain that subjective reason.

With respect to the other three applicants, the appellate court held that the Commission had marshaled sufficient evidence of pretext to make summary judgment inappropriate. Addressing Target's contention that the store manager could not have discriminated against White, Edgeston, and Brown-Easley because he did not know their race, the court stated that the Commission presented evidence which undermined that assertion. The applicants' resumes all had information which suggested that they were African American, such as membership in an African American sorority and other affiliations. While Target argued that the hiring official would not have had White's resume in front of him when he spoke to her, and therefore would not have known her race at that time, the court rejected this argument based on the Commission's expert evidence regarding the ability of individuals to recognize a person's race based simply on their voice and/or name. Dr. Thomas Purnell, a linguistics professor who has researched racially-affiliated dialects and telephone-filtered speech, testified that White, Edgeston, and Brown-Easley were discernible as African American based on their voices over the telephone. The court also concluded that the testimony of Dr. Marianne Bertrand, an economics professor who has studied the differing responses received by job applicants who have African American-sounding or Caucasian-sounding names, might persuade a reasonable factfinder that the store manager at least suspected that White was African American and "Brucker" was Caucasian when he spoke to them on the telephone.

Canady v. Wal-Mart Stores, rehearing denied, 452 F.3d 1020 (8th Cir. May 30, 2006)

The Commission filed a brief as amicus curiae in support of the plaintiff's petition for rehearing in this racial harassment case. Rehearing was denied. The plaintiff, Canady, an African American, was a produce associate at Wal-Mart for 6 months. Smith, who was white, was Canady's supervisor. During Canady's tenure at Wal-Mart, Smith (1) referred to himself as a "slave driver," (2) asked Canady, "what's up, my nigga?," (3) referred to Canady on several occasions as a "lawn jockey," (4) said that all African Americans look alike, and (5) remarked that Canady's skin color seemed to wipe off onto towels when he sweated. Canady sued for a racially hostile work environment. The district court granted Wal-Mart's motion for summary judgment and a divided panel of the Eighth Circuit affirmed. Canady petitioned for rehearing.

In its brief as amicus curiae in support of rehearing, the EEOC argued that the panel's opinion undermined Title VII enforcement by misapplying the "severity" prong of the hostile work environment analysis to egregious racial slurs made by a supervisor to and about a subordinate. EEOC argued that the panel underestimated the effect of a supervisor's racial slurs and set an impermissibly high standard for proving a racially hostile work environment. The brief advocated a standard for evaluating racial harassment claims that more fully recognizes the historical and social context of race relations in this country, the power imbalance that exists between supervisors and their subordinates, and the inflammatory nature of certain racial epithets – specifically, the degrading and dehumanizing impact of the N-word.

Tademy v. Union Pacific Corp.,No. 06-4073 (10th Cir.), brief as amicus curiae filed June 28, 2006

The Commission filed a brief as amicus curiae to address the standard for establishing a timely claim involving a hostile work environment under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Beginning in the mid-1990s, the plaintiff, who is black, experienced a succession of incidents of racial hostility in the workplace. He reported these incidents, but defendant either failed to investigate or imposed ineffectual discipline on the perpetrators. In June 2001, plaintiff filed an EEOC charge about this harassment but decided not to file suit because defendant promised to institute training on harassment. Defendant allegedly did not do so. In July 2003, the plaintiff found a hangman's noose at his worksite. Following an investigation, defendant fired the individual who admitted placing the noose; he was, however, later reinstated. After word of the termination got out, plaintiff began to experience hostile treatment from his coworkers. In January 2004, plaintiff filed a second EEOC charge describing the noose incident and noting that he had also reported many other racial occurrences to management. He then filed suit. The district court granted defendant's motion for summary judgment on the ground that the evidence was insufficient to support a finding of a hostile work environment. In reaching this conclusion, the court refused to consider the incidents occurring before plaintiff's first charge in 2001, holding that they were not part of the same hostile work environment.

In its amicus brief, the Commission argued that all of the alleged incidents were sufficiently related to one another in nature to constitute a single hostile work environment. The fact that different employees may have perpetrated each individual act should make no difference in determining whether a hostile work environment exists from the perspective of the victim. The Commission argued that under *Morgan* the plaintiff may obtain relief for the entire hostile work environment, including acts of harassment prior to his first charge, because it constituted a single violation. Even if the earlier acts of harassment were not part of the same hostile work environment, the district court should have considered them as background evidence supporting the plaintiff's claim that he was subjected to a hostile work environment during the charge-filing period. A decision had not been issued as of the date of this report.

6. National Origin Discrimination

Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. Jan. 11, 2006)

The Commission filed a brief as amicus curiae in this private Title VII case brought by a group of Hispanic employees challenging a city's English-only policy which had the stated purpose of ensuring "effective communications among and between employees and various departments," "prevent[ing] misunderstandings," and "promot[ing] and enhanc[ing] safe work practices." The Court of Appeals for the Tenth Circuit reversed the district court's entry of summary judgment in favor of the defendant. The court found that there was sufficient evidence for a reasonable jury to conclude that (1) the plaintiffs had established a prima facie case of disparate impact discrimination and (2) the defendant had failed to establish the business necessity defense.

The court concluded that the policy itself could contribute to a hostile work environment, as the Hispanic employees could consider that being prohibited from using their preferred language was "an expression of hostility," particularly where there was no legitimate purpose for the restriction. The court also addressed the Commission's guideline on English-only rules, 29 C.F.R. § 1606.7, and found it persuasive that the Commission had "consistently concluded that an English-only policy, at least when no business need for the policy is shown, is likely in itself to 'create an atmosphere of inferiority, isolation, and intimidation' that constitutes a 'discriminatory working environment.'"

7. Religious Accommodation

Baker v. Home Depot, 445 F.3d 541 (2d Cir. Apr. 19, 2006)

In this Title VII action alleging discrimination on the basis of religion, the plaintiff, a Sabbatarian Christian, believed that he had a religious duty to worship God and refrain from working on Sundays. Before firing him, the employer offered to allow him to work only afternoon and/or evening shifts on Sundays, exempting him from Sunday morning shifts (and thus allowing him to attend Sunday morning services). The district court held that this was a reasonable accommodation as a matter of law and granted the employer summary judgment. The Commission filed a joint amicus brief with the Civil Rights

Division of the Department of Justice arguing that the employer's offer was not a reasonable accommodation because it did not permit the plaintiff to fulfill his religious obligation to refrain from working on Sundays. The Court of Appeals for the Second Circuit reversed, agreeing with the position advocated in the government's amicus brief.

EEOC and Carter v. Robert Bosch Corp., 169 Fed. Appx. 942 (6th Cir. February 21, 2006).

The Court of Appeals for the Sixth Circuit reversed the district court's grant of summary judgment in favor of the defendant in this Title VII action by EEOC alleging that the Robert Bosch Corporation failed to reasonably accommodate an employee's religious beliefs, as a member of the Old Path Church of God, that he should not work on his Sabbath (sundown Friday to sundown Saturday). The court of appeals held that the district court erred in granting summary judgment because there was a factual dispute about what Bosch was willing to do to reasonably accommodate the employee's religious observance -- in particular, whether the company would permit shift swapping -- and that the lower court erred in holding as a matter of law that the employer had reasonably accommodated its business to Carter's religious observance.

8. Disability Discrimination

Heiko v. Colombo Savings Bank, 434 F.3d 249 (4th Cir. Jan. 10, 2006)

The Court of Appeals for the Fourth Circuit reversed the district court's grant of summary judgment in favor of the defendant in this ADA suit brought by James Heiko, a banker who suffered from end stage renal failure requiring thrice-weekly hemodialysis treatments. Consistent with EEOC's arguments as amicus curiae, the court of appeals held that "the elimination of bodily waste is a major life activity" within the meaning of the ADA and that, as a result of his condition and treatment, Heiko was substantially limited in that major life activity at the time of the challenged employment decisions. In addition, the appellate court held that summary judgment on Heiko's failure to promote claim was improper in light of evidence of Heiko's superior qualifications. The court of appeals concluded that the "ADA was designed to protect the 'truly disabled, but genuinely capable,'" and, as someone "determined to surmount a real disability and make a constructive contribution to the workplace," Heiko "seems just the sort of person for whom the ADA was intended."

9. Retaliation

Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (June 22, 2006

The Supreme Court held that the antiretaliation provision of Title VII (section 704(a)) is not limited to discriminatory actions affecting a term, condition, or privilege of employment, and thus is broader than Title VII's core antidiscrimination provision (section 703(a)). The Court held that the antiretaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse,"

which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process. Although the EEOC did not participate in the case in the Supreme Court, the Court endorsed the Commission's longstanding position, set forth in the agency's Compliance Manual, that the retaliation provision prohibits any retaliatory act that is reasonably likely to deter protected activity.

The case involved a plaintiff's claim that she had been moved from her forklift operator position to a more arduous track laborer job in retaliation for complaining of sex-based harassment and was given a 37-day suspension because she filed an EEOC charge. In the court below, a panel of the Sixth Circuit had set aside a jury verdict for the plaintiff on the grounds that neither the transfer nor the suspension (for which plaintiff had been awarded backpay after an internal complaint) constituted an adverse employment action sufficient to raise a retaliation claim. The EEOC had filed a brief in the Sixth Circuit as amicus curiae in support of rehearing en banc, advancing the "reasonably likely to deter" standard set forth in the Compliance Manual. In its en banc decision, the Sixth Circuit declined to adopt the broader standard, holding that the antiretaliation provision prohibits only adverse employment actions, but held that both the transfer and the suspension were actionable under this standard. Rejecting the Sixth Circuit's holding that the antiretaliation provision encompasses only adverse *employment* actions, the Supreme Court held that the provision extends beyond workplace- or employment-related harms and thus is not coterminous with Title VII's substantive antidiscrimination provision.

Jordan v. Alternative Resources Corp., 447 F.3d 324 (4th Cir. May 12, 2006)

The Commission filed an amicus brief in this Title VII action arguing that an employee should be protected under section 704(a) from employer retaliation if he complains to the employer about significantly offensive racist or sexist workplace behavior that if repeated often enough would create a hostile work environment. The Court of Appeals for the Fourth Circuit rejected the Commission's argument. The panel majority held that an employee is not protected against employer retaliation until he has a reasonable belief that a hostile environment already exists or is "in progress" and about to occur. Judge King filed a strong dissent. The court of appeals subsequently denied rehearing en banc on an evenly divided vote.

Watson v. E.S. Sutton, Inc., 225 Fed. Appx. 3 (2d Cir. Nov. 27, 2006)

In this case involving what constitutes protected activity under section 704(a) of Title VII, the Commission filed a brief as amicus curiae in support of a jury's verdict that the defendant violated Title VII by firing the plaintiff for complaining about a "distressing incident" where a coworker came into plaintiff's office and stated that he had read in *Penthouse* magazine about women "peeing on men during sex" and asked whether plaintiff ever engaged in this practice with her boyfriend, implying that she did. The plaintiff knew that the coworker had made similar comments or inquiries to other employees, one of whom had also complained to management. On appeal, the defendant argued inter alia that, under *Clark County School District v. Breeden*, 532 U.S. 268

(2001), the plaintiff did not engage in protected activity by complaining about the single incident of harassment. Addressing this point, EEOC's brief argued that the jury reasonably found that the plaintiff's complaint was protected under section704(a) of Title VII. By alerting the employer to conduct that, if repeated often enough, could create a hostile work environment, plaintiff was opposing a practice made unlawful by Title VII. In its 1998 decisions in *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*, determining the standards for employer liability for sexual harassment by supervisors and managers, the Supreme Court stressed that Title VII's purposes are best served when employees complain before a hostile work environment has developed, and it is inconceivable that the Court in *Breeden* intended to allow employers to retaliate against employees who do just that. The court of appeals affirmed the verdict without reaching EEOC's argument.

EEOC v. The Boeing Co., No. 05-17386 (9th Cir.), brief as appellant filed May 2, 2006

The Commission brought this sexual harassment and retaliation suit alleging that Kelley Miles was subjected to several years of sex-based coworker harassment and that the defendant failed to reasonably respond to her complaints to supervisors, written complaints, and EEOC charge. The suit also alleges that the defendant retaliated against Miles when she complained by suggesting she would suffer negative consequences for complaining and by failing to reasonably respond to her complaints that her coworkers were harassing her because of her internal sexual harassment complaints and her EEOC charge. The district court granted summary judgment to the defendant, and the Commission appealed. A decision had not been issued as of the date of this report.

On appeal, the Commission's brief argued that the evidence was sufficient to support a finding that, because of her sex, Miles's coworkers subjected her to conduct which was both subjectively and objectively hostile, and which was sufficiently severe or pervasive to create a hostile work environment. The evidence was also sufficient to support a finding that the defendant was aware of the harassment, but did not take sufficient action to remedy the harassment. The Commission also argued that the evidence was sufficient to support a finding that the defendant retaliated against Miles for complaining in writing to the human resources department about the harassment and for filing a charge. There was sufficient evidence to support a finding Miles's coworkers subjected her to harassment, in the form of increased hostility and ostracism, because of her internal complaints and EEOC charge. While ostracism is not, standing alone, sufficient to support a discrimination claim, the Ninth Circuit has recognized that ostracism may contribute to a hostile work environment. The brief disagrees with the Ninth Circuit's use of a "severe or pervasive" standard for claims of retaliatory harassment, because that standard was developed for claims of discrimination under section 703(a) of Title VII, which accords less broad coverage than the antiretaliation provision of Title VII. Nevertheless, even under the "severe or pervasive" standard, the evidence was sufficient to support a finding that the retaliatory harassment was actionable. There is also ample evidence that Miles complained about this retaliatory harassment, but the defendant failed to take any measures reasonably calculated to remedy the harassment.

E. *Litigation in Federal District Courts*

In this section of the Annual Report, we discuss significant trial court resolutions during the fiscal year. The cases are organized generally by the basis (e.g., race, sex) of the discriminatory conduct, but suits often involve multiple bases and issues, and sometimes statutes. Also, although there is a separate subsection below on retaliation resolutions, more than a third of the suits filed and resolved during the year contained retaliation claims, and such claims are noted in a number of the cases discussed under other bases.

A continuing serious obstacle to achieving equal employment opportunity is the willingness of employment agencies to comply with discriminatory requests from their clients, and to sometimes decide on their own to use discriminatory criteria in determining whom to refer to particular jobs. For example, in *EEOC v. SPS Temporaries, Inc., Jamestown Container Corp., and Whiting Door Manufacturing Corp.* (W.D.N.Y. Nov. 22, 2005), the EEOC alleged that the largest temporary employment agency in Buffalo, New York and two of its clients engaged in various violations of Title VII, the ADA, and the ADEA. The suit alleged that SPS: (1) failed to refer applicants for temporary employment due to their race, gender, pregnancy, national origin, age, or disability, and due to their responses to unlawful preemployment medical inquiries; and (2) violated the Commission's recordkeeping regulations by intentionally and systematically destroying documentary evidence during the EEOC's investigation. The suit also alleged that defendants Whiting Door (an Akron, New York manufacturer of roll-up and swing doors for trucks and trailers) and Jamestown Container (which has container-manufacturing facilities in Lockport and Cheektowaga, New York) engaged in hiring discrimination in violation of Title VII in filling temporary general laborer positions. According to the suit, Whiting Door asked SPS not to refer female applicants and Jamestown Container asked SPS to not to refer black or female applicants.

EEOC entered into separate consent decrees with the defendants, resolving the case for a total of $580,000 in monetary relief and substantial injunctive and affirmative relief. The 4-year SPS decree enjoins defendant from discriminating on the basis of race, sex, pregnancy, national origin, disability, or age, including complying with discriminatory requests from clients and requiring applicants for temporary employment to complete preemployment questionnaires containing questions that may reveal information about actual or potential disabilities. The SPS decree also requires the distribution of a notice regarding resolution of the case and a memorandum setting forth the coverage of federal employment discrimination laws to all applicants, employees, and clients. SPS must also place job advertisements for temporary positions in specified newspapers and send job notices to specified organizations, with the goal of increasing applications from blacks, Latinos, females, disabled individuals, and persons 40 years old and above. SPS will provide the EEOC with semiannual reports on the race, sex, age, national origin, and disability status of applicants for temporary employment. The Whiting Door and Jamestown Container decrees (3 years each) require the adoption of nondiscrimination policies, and reporting on the hiring of temporary employees and on temporary employment agencies each defendant uses.

1. Disparate Treatment on the Basis of Race or National Origin

When Title VII was passed, Congress sought in particular to enable African Americans to compete on equal terms -- i.e., to be evaluated according to their abilities -- in the job market. As the cases discussed in this and the next subsection demonstrate, employment discrimination against African Americans and other minorities remains a significant problem in the United States.

a. Hiring and Promotion

The actual or assumed prejudices of others have discriminatory consequences outside the employment agency context. For example, in *EEOC v. Merrill Gardens, LLC* (N.D. Ind. Oct. 6, 2005), a company which owns assisted living and other senior facilities in 14 states failed to hire African American and other non-Caucasian applicants into nursing support, food service, and housekeeping positions at an assisted living facility in Fort Wayne, Indiana because of their race and/or color, and failed to retain employment applications as required by EEOC's regulations. After purchasing the facility, defendant employed the prior owner as General Manager, and she continued her practice of coding the applications of minority applicants because she believed residents preferred white employees and did not want minorities to come into their rooms. Defendant fired the General Manager after she admitted to race-coding applications. EEOC's suit was consolidated with a private suit brought as a class action. EEOC's 42-month consent decree prohibits defendant from discriminating against employees and applicants based on race or color and from retaliation. The decree provides $324,000 in backpay and compensatory damages to six named individuals, and $326,000 to claimants identified through advertisements paid for (up to $70,000) by defendant. Defendant is also required to provide training to the facility's current General Manager, a Regional Dining Director, and a Regional Vice President of Operations on nondiscrimination in hiring.

In *EEOC v. Zenith Insurance Co.* (C.D. Cal. Jan. 24, 2006), EEOC alleged that a property insurer failed to hire black applicants into mailroom positions at its Woodland Hill, California office. A black applicant with the requisite experience and a degree in graphic arts applied in response to an advertisement and was rejected. Defendant readvertised the position shortly thereafter and hired a white applicant with no mailroom experience. Although claiming no recollection of why the black applicant was rejected, defendant said that it might have been because he was overqualified. However, defendant hired a number of whites with AA or BA degrees for mailroom clerk positions. Defendant also rejected a number of other qualified black applicants for mailroom positions, while hiring white candidates. The case was resolved through a 3-year consent decree providing $180,000 in compensatory damages to be distributed to rejected black applicants. The decree requires defendant to make good faith efforts to obtain a hiring rate of at least 18% African Americans in clerical positions at the Woodland Hill facility for each year of the decree. Defendant will report to EEOC on its recruitment and hiring efforts and on applicants and hires by race.

In *EEOC v. S&Z Tool Co., Inc.* (N.D. Ohio Aug. 16, 2006), EEOC alleged that since at least 1991, S&Z Tool Company, a Cleveland manufacturer of precision metal products,

had failed to hire African Americans and women into laborer and machine operator positions because of their race and sex, and failed to retain employment applications as required by EEOC's regulations. The case originated from the charge of a female applicant who in 1999 hand-delivered her application and informed defendant's receptionist that she had a relative who worked at the plant. Although she had manufacturing experience and met other requirements for the laborer job, defendant rejected her, while hiring six nonblack men who applied at about the same time. Defendant had employed women only as clericals, and had not employed blacks at all. This case was resolved with a 39-month consent decree for $940,000 in monetary relief to a class of affected individuals. The decree requires defendant to consider female and black applicants on the same basis as all other applicants, to engage in good faith efforts to increase recruitment of female and black applicants, and to appoint an EEO Coordinator. Defendant also will submit reports to the EEOC indicating applicant flow and hiring data by race and sex and will retain records regarding its recruitment and hiring efforts.

In *EEOC v. ThyssenKrupp Elevator Manufacturing, Inc.* (W.D. Tenn. Oct. 25, 2005), the Commission alleged that defendant, which manufactures, installs, and repairs elevators throughout the United States, failed to hire and promote black employees at its Middleton, Tennessee facility because of their race. The Middleton facility employs mechanics, temporary mechanics, and helpers in its construction and service departments. Jobs in the service department, where all the employees were white, were cleaner and less strenuous than in the construction department, and had better working hours, more overtime, fewer layoffs, and extra training opportunities helpful in passing the mechanic's test. For 6 years, two black employees unsuccessfully sought transfer/promotion from the construction department into the service department, while defendant hired and transferred less qualified whites into the service department. The 2-year consent decree resolving this case provided $175,000 in monetary relief to a class of black claimants identified by the Commission and enjoins defendant from race discrimination and retaliation. Defendant must use its best efforts to hire qualified minority applicants, including advertising in a designated newspaper and in other are newspapers. Defendant must invite previously rejected black applicants, identified by EEOC, to take a preemployment test, and must make a good faith effort to hire individuals who pass the test.

In *EEOC v. Qwest Communications Corp. & U.S. West Communications* (D. Ore. March 29, 2006), EEOC alleged that defendant U.S. West (which merged with defendant Qwest to form a broadband communications network serving 29 million customers), discriminated against Hispanic employees in Portland, Oregon by failing to promote or grant job transfers to them, and retaliated against two individuals for filing discrimination charges. One of the charge filers had worked for U.S. West for 18 years and the other for 23 years, and neither had been promoted despite qualifications equal to or superior to non-Hispanics who received promotions. Supervisors applied defendant's promotion and job transfer policies inconsistently so as to exclude Hispanics from the pool of eligible candidates, and when Hispanics were in the pool, defendant selected less qualified non-Hispanic candidates over qualified Hispanics. After the two Hispanic employees filed

discrimination charges, defendant: (1) diverted sales calls away from them to other, newer employees, (2) warned them about deficiencies in their sales goals, and (3) placed them on disciplinary status for failing to meet sales goals. The lawsuit was resolved through a consent decree providing $400,000 in monetary relief to eight aggrieved individuals.

In *EEOC v. FedEx Freight East, Inc., fka American Freightways, Inc.* (E.D. Mo. Oct. 31, 2005), the Commission alleged that American Freightways discriminated against black employees at its St. Louis terminal by selecting them for promotion from part-time to full-time dockworker jobs at a slower pace than whites, treating them adversely with respect to work assignments, training, and skill-development opportunities, and failing to promote a black employee into a dock foreman job because of his race. Under a consent decree, 20 aggrieved individuals shared $500,000 in monetary relief. Defendant must report quarterly to the Commission for 3 years on promotions to dockworker and city driver positions.

b. Terms and Conditions of Employment

In *EEOC v. Northwestern Human Services* (E.D. Pa. Sept. 25, 2006), EEOC alleged that a social services agency providing community-based behavioral and mental health services in Pennsylvania, New Jersey, Virginia, and Ohio, discriminated against employees in its Philadelphia facility in their terms and conditions of employment and discharged them based on their national origin, African (Sudanese- or Nigerian-born). Defendant told a number of employees to submit a plan to obtain additional credentials in their professional fields. Defendant's new Program Director terminated African employees who had not yet completed their credentials, while allowing white/non-African-born employees to continue working while completing their credentials. Defendant also reduced or eliminated the cases and work hours assigned to African therapists and behavioral consultants, while continuing to give a full workload to similarly situated non-African employees. Under the consent decree resolving this case, eight claimants equally shared $600,000 in monetary relief. The decree enjoins defendant from national origin discrimination and retaliation.

In *EEOC v. John Pickle Co.* (N.D. Okla. May 24, 2006), EEOC alleged that a designer and fabricator of steel products for the petrochemical and power industries discriminated against East Indian workers (welders, fitters, roll/brake operators, and electrical maintenance personnel) in wages and other terms and conditions of employment and subjected them to a hostile work environment because of their race and national origin. Defendant, through a contract with an Indian company, AL Samit International, recruited the claimants, all citizens of India, to come to the United States for jobs that were to last at least 2 years. Defendant misrepresented the pay and living and working conditions the East Indian employees would receive in the United States, not only paying them less than similarly situated non-Indian employees, but also failing to pay them the minimum wages and overtime premiums required under the Fair Labor Standards Act (FLSA). The hostile work environment and disparate terms and conditions of employment included numerous offensive comments about the claimants' ancestry, ethnic background, culture, and country; threats to physically harm them and to deport them; requiring them to live in

substandard housing and subsist on poor quality, rationed food; subjecting them to greater testing requirements, lower job classifications, and less desirable job assignments; and restricting their movement, communications, worship opportunities, and access to health care. Within a month, East Indian employees began "unauthorized departures" from defendant's facility, resulting in an unsuccessful attempt by defendant to deport seven of them. Within a few months, the remaining East Indian employees left with the aid of area churches, and several months later defendant ceased operations.

EEOC's Title VII suit was consolidated with a private action filed by 52 East Indian claimants seeking relief from defendant and its President under 42 U.S.C. § 1981, the FLSA, and Oklahoma tort law. After a 2-week bench trial, the court decided for EEOC and the private plaintiffs on all claims. Although visas obtained by the defendant for the East Indian employees did not authorize them to be employed for wages in the United States, the court held that the claimants were entitled to a monetary award for work already performed of $607,006, which included compensatory damages for emotional distress caused by the disparate treatment and hostile work environment. The court awarded each claimant $1,000 in punitive damages on the Title VII/§ 1981 claims, bringing the total recovery on EEOC's claims to $657,006. In addition, the court awarded the claimants $58,417.68 in liquidated damages on their FLSA claims, $472,056 on their tort claims for deceit, and $52,000 ($1,000 each) in compensatory damages for restrictions endured during nonworking hours and weekends. Following a motion to reconsider, the court awarded the private plaintiffs an additional $52,000 in compensatory damages on their § 1981 claims.

In *EEOC v. Highland Hospital of Rochester, Inc., and Strong Health MCO IPA, Inc.* (W.D.N.Y. May 9, 2006), EEOC alleged that Highland Hospital, an acute care hospital in Rochester, New York, and Strong Health, a hospital network in which Highland Hospital participates, discriminated on the basis of national origin through imposition of a blanket English-only policy upon members of the environmental services (housekeeping) department and disciplined employees of Puerto Rican and Cuban national origin for violating it. When the policy was adopted, defendant's managers knew that some of its employees were fluent only in Spanish, and referred to the policy as the "no Spanish" rule. The "no Spanish" rule made it difficult for Spanish-speaking housekeeping employees to understand instructions, such as which rooms to clean. Defendant issued a written warning to the housekeeping supervisor for saying goodbye to employees in Spanish when she was clocking out for the day. It also gave written warnings to three employees for speaking Spanish in front of employees who did not understand Spanish. A lab assistant whose primary language was Spanish and who was married to the housekeeping supervisor, had to obey the "no Spanish" rule even when he visited his wife during breaks. Under the consent decree resolving the case, eight claimants shared $200,000 in monetary relief. Defendants were enjoined from instituting an English-only rule or any other restrictive language policy

2. Race and National Origin Harassment

Many of EEOC's suits each year address overt racial or ethnic animus in the workplace, much of which is reminiscent of the pre-Civil Rights Act era. In *EEOC v. Commercial Coating Services, Inc.* (S.D. Tex. March 21, 2006), EEOC alleged that a Conroe, Texas company that coats pipes and provides other services in the oil industry, subjected an African American sandblaster to racial harassment and constructively discharged him because of his race and color. Defendant hired the African American employee as a laborer and placed him on a crew that had no other blacks. His supervisor and coworkers repeatedly subjected him to racial slurs, including regularly calling him by the "N" word. He complained about his treatment to his supervisor and asked to be referred to by his name, but the supervisor took no corrective action and the conduct continued. He then asked to transfer to another crew, but, although defendant routinely approved transfer requests by non-African American employees without delay, his request was put on hold. One day a white coworker took a heavy rope noose, which had been hanging on an equipment hook in plain view, and threw it around the black employee's neck when the latter entered the restroom. The noose tightened in the scuffle that ensued. Their supervisor broke up scuffle and cautioned both of them about "horseplay," but took no corrective action and made no written report at the time. When the Production Manager learned about the noose incident, he instructed the supervisor to write a report about the incident and allowed him to backdate it. The Production Manager also fired the white coworker for violating defendant's safety policy. Under the consent decree resolving this case, the African American employee, who intervened in EEOC's suit, received $1 million in monetary relief and a written apology from defendant's President or CEO. Defendant is permanently enjoined from engaging in race discrimination or racial harassment or intimidation. The decree also prohibits defendant from employing four identified individuals and from allowing them to remain on its premises.

EEOC v. Cracker Barrel Old Country Store, Inc. (N.D. Ill. March 13, 2006) alleged that in three Illinois locations of a nationwide chain of nearly 400 restaurant/gift stores, employees were subjected to harassment and adverse terms and conditions of employment based on race and sex, and were retaliated against for complaining about the discriminatory conditions. Black employees at the restaurants were referred to in racially derogatory terms, and subjected to disparate working conditions, such as having to wait on customers that white employees refused to serve and to work in the smoking section; female employees were subjected to offensive sexual comments and touching by male managers and coworkers; and a white employee was subjected to racially offensive language because of her association with a black employee. Employees were harassed for complaining about the discriminatory conduct. Management officials at the three Illinois stores failed to take effective corrective action to stop the race- and sex-based harassment and other discrimination, and defendant took no action in response to complaints called into the company's complaint hotline. Under the consent decree resolving this case, defendant paid $2 million into a settlement fund to provide compensatory damages to 51 individuals. The decree enjoins defendant at the three restaurants named in the complaint from discriminating against employees based on race or sex, subjecting employees to a racially or sexually harassing work environment, or retaliating against anyone under Title VII. Defendant must provide annual training, approved by EEOC, to managers on sexual

and racial discrimination, including harassment and retaliation issues, and to all employees on workplace harassment.

EEOC v. Iron City Constructors, Inc., and The Boldt Co. (W.D. Wis. Nov. 23, 2005 (Boldt) and Dec. 16, 2005 (Iron City)) presented claims of racial harassment and race-based termination of African Americans and individual retaliatory discharge. Boldt was the general contractor for a power plant project in Beloit, Wisconsin and Iron City was the metal sheeting subcontractor on the project. An African American apprentice member of the local Iron Workers Union worked on the project as an employee of Iron City. On his first day, he saw racist graffiti in the portable toilets maintained by Boldt at the worksite. He complained about the graffiti to his direct supervisor and also to a Boldt supervisor, but neither defendant took corrective action. In addition, the employee's supervisor regularly used abusive and racially derogatory language toward him and otherwise treated him with hostility. The employee repeatedly complained to his supervisor about the working conditions, including the appearance of a noose in his lunchbox. When he asked for Iron City's corporate phone number so he could complain about racial issues, the supervisor threatened to fire him immediately if he complained. After 3 months, Iron City laid the employee off (along with the only other black employee on its payroll and one white employee), ostensibly due to lack of work. Iron City tried to hire two whites the next day, but the union blocked the effort. EEOC entered into separate consent decrees with Iron City and Boldt, resolving the case for a total of $275,000 in monetary relief: $125,000 to the African American apprentice, $20,000 to another black employee, and a $130,000 settlement fund for African-American employees of Boldt and its subcontractors who worked at the project and who the EEOC determined were subjected to racial harassment, including exposure to racial graffiti. The decrees require defendants to develop, implement, and disseminate policies and procedures regarding racial harassment and retaliation and the investigation of internal complaints. The Iron City decree enjoins defendant from race discrimination, racial harassment, and retaliation, and the Boldt decree enjoins defendant from racial harassment and retaliation.

In *EEOC v. Interstate Hotels, L.L.C.* (N.D. Cal. Oct. 5, 2005), EEOC alleged that the owner/operator of the Marriott Fisherman's Wharf Hotel in San Francisco subjected Hispanic food service workers to a hostile work environment based upon their national origin, and retaliated against them for complaining about the discriminatory treatment. The hotel's Food and Beverage (F&B) Director called Hispanic workers "monkeys," "lazy," "stupid," "slow learners," "useless," and "dirty." After a Hispanic employee complained to management, the F&B Director intensified his harassment and subsequently took the employee off the schedule, resulting in lost wages. The F&B Director also subjected other Hispanic food service workers who complained to increased harassment and other retaliatory acts, including termination. Under the consent decree resolving this case, aggrieved employees shared $320,000 in monetary relief. Defendant was also required to hire an outside consultant to provide annual training on national origin discrimination to all employees responsible for supervising or managing employees at its hotel, and to train its human resources staff on how to investigate claims of discriminatory harassment.

In *EEOC v. Carl Karcher Enterprises, Inc., d/b/a Carl's Jr. Restaurant* (E.D. Ca. Dec. 13, 2005), the EEOC alleged that an operator of fast food restaurants subjected African American staff members (some of them minors) at its Elk Grove, California, restaurant, to a racially hostile work environment and discharged an employee for complaining about the harassment. A white male shift leader subjected black employees to frequent racial comments. He used the "N" word, bragged about his skinhead activities, stated that he believed whites were the superior race, flashed white power signs, bragged about having a Confederate flag hanging outside his home, displayed racist tattoos (a swastika and White Power gang symbols), and said that he wanted to put a tattoo on his forehead depicting a black lynching victim. A black shift leader gave the Assistant Manager a letter signed by eight employees complaining about racial harassment, and 3 days later met with the District Manager about the matter. The resulting "investigation" consisted solely of interviews with managers and the culpable shift leader, and found no evidence of harassment. Shortly thereafter, defendant suspended and then discharged the black shift leader, ostensibly for violating its cash handling and food preparation rules, even though other employees who violated those rules were not disciplined. Under the consent decree resolving this case, defendant paid $255,000 in monetary relief, consisting of $105,000 to the black shift leader and $150,000 to a settlement fund, to be distributed as compensatory damages to eligible claimants. Defendant must implement EEO and harassment policies and complaint procedures at nine restaurants and provide antiharassment training to all current and new management and supervisory employees.

EEOC v. Lithia Motors, Inc., d/b/a Lithia Dodge of Cherry Creek (D. Colo. March 8, 2006) presented allegations that Lithia Motors (the eighth largest automobile retailer in the U.S.) and its Aurora, Colorado subsidiary maintained a racially hostile work environment and constructively discharged a black employee in retaliation for complaining about race discrimination. After buying the Aurora dealership, Lithia brought in a new white General Manager whom it had previously disciplined for "anger management issues." Shortly after the General Manager's arrival, he made remarks to a long-term black employee about "BP time" (black people time) and said that he had fired "a bunch of you people already." He also subjected the black employee to less favorable treatment than whites (screamed obscenities at him more frequently and required him to undergo a drug test when no reasonable grounds existed for so doing while not testing a white employee known to be intoxicated at work). After the employee filed an internal complaint, the General Manager berated the personnel coordinator for assisting with the complaint and intensified his harassment of the employee, who resigned a month later after hearing nothing from headquarters about his complaint. Defendant subsequently counseled the General Manager about unacceptable behavior, but took no other action. The resulting suit was resolved through a consent decree providing three former black employees with $562,470 in monetary relief. The decree prohibits defendant from discrimination based on race, color, or national origin.

EEOC v. Melrose Hotel Co., Inc., MHC Barbizon, L.P., and Berwind Property Group, Ltd. (S.D.N.Y. March 24, 2006) involved national origin discrimination and retaliation against Hispanic managers and employees at The Melrose Hotel New York in Manhattan. The case arose after the Berwind Property Group, which manages real estate nationwide,

took over management of the hotel through its local MHC Barbizon affiliate. Berwind's new Senior Vice President of Operations regularly made demeaning comments about Hispanic employees, mocking their accents and telling employees speaking Spanish on break in the cafeteria that "this is an English country." Another manager also made derogatory comments about Hispanics, telling them not to speak Spanish even during breaks, and saying she couldn't wait until all the Hispanic employees were fired. After the hotel's Hispanic General Manager forwarded complaints about the harassment to the Senior Vice President for Human Resources, the Vice President of Operations began criticizing her performance, and eventually fired her despite 7 years of positive evaluations under previous management. The hotel's Hispanic Assistant Director of Housekeeping resigned shortly thereafter because of defendants' failure to address her frequent complaints about the harassment of Hispanic employees. Defendants retaliated against other Hispanics who complained about discrimination and harassment, including the English-only rule, either terminating them or subjecting them to abusive treatment that forced them to resign. Under the consent decree resolving this case, 13 claimants shared $800,000 in backpay and compensatory damages. Berwind must maintain comprehensive policies prohibiting employment discrimination, including effective procedures for processing internal discrimination complaints.

3. Disparate Treatment on the Basis of Sex

a. Hiring and Promotion

EEOC continues to litigate cases involving the exclusion of women from jobs employers believe should be held only by men. *EEOC v. Recon Refractory & Construction, Inc.* (C.D. Cal. Oct. 27, 2005) involved a refusal to hire women as laborers for a 2-month project at defendant's Carson, California oil refinery. Defendant had advertised for 300 laborer positions, stating in the ad that refractory experience was helpful but not necessary. A woman applied for a position through a veterans job referral, and successfully completed all prerequisite training, testing, and physical exams. After she was rejected for employment, the veterans referral representative told her defendant's hiring official for the project had stated that women were not being hired. A temporary employee working under defendant's hiring official told the Commission that the hiring official said that defendant would not be hiring women because it did not get the contract for the fire watch position, a subcategory of laborers for which defendant normally hired only women. Defendant did not hire any women for laborer positions on the project. Under the 18-month consent decree resolving this case, rejected female applicants received $165,000 in monetary relief. The decree enjoins defendant from discriminating against women in hiring; requires it to increase diversity in its workforce by undertaking recruiting activities and hiring practices to promote equal opportunities for women; and sets numerical goals for hiring women into laborer positions in future projects.

EEOC v. Kroger Texas, L.P. (S.D. Tex. July 27, 2006) presented claims that a large supermarket chain failed to hire female applicants into order selector jobs at its Houston Distribution Center because of their sex, and failed to retain employment applications as required by EEOC's regulations. The order selector job is physically demanding, requiring lifting and stacking boxes onto a motorized pallet jack, shrink-wrapping the

entire load, transporting the load onto a truck, and unloading the pallet onto the truck while exposed to outside temperatures. Defendant's stated qualifications included a stable work history, order selecting experience in a grocery environment, and electric pallet jack experience. Two female applicants with substantial order selecting experience filed discrimination charges after being rejected for employment. Neither was interviewed by defendant, and EEOC's investigation showed that men who applied at the same time and had no relevant experience were hired. At the time, defendant employed no women out of approximately 100 order selectors, and the manager responsible for hiring warehouse employees admitted that he had never hired a female order selector. Under the 30-month consent decree resolving this case, 14 female applicants shared $137,000 in monetary relief. Defendant is required to implement and validate in a manner acceptable to EEOC a revised physical ability test for the order selector position, and, contingent on their passage of the new test, must offer jobs to women who applied for order selector jobs between September 1, 2003, and December 31, 2005, and were not hired.

In *EEOC v. Morton Buildings, Inc.* (N.D. Tex. June 5, 2006), the manager of the McKinney, Texas office of a national construction company hired a woman with 30 years of sales and marketing experience (20 in commercial real estate construction and sales) as a sales consultant, despite resistance from a Regional Manager who pressed him to hire an inexperienced male instead. The Regional Manager made statements to the staff indicating that he was uncomfortable about women working in construction sales. During a subsequent period of decreased sales, defendant fired the female sales consultant, ostensibly for lack of production, while retaining male trainees hired at the same time who had made fewer sales. Under the consent decree resolving the case, defendant agreed to pay the sales consultant $275,000 and provide her with a letter of reference agreed to by the parties.

Also see *EEOC v. S&Z Tool Co., Inc.*, discussed in section II.D.1.a. above.

Other cases demonstrate that women continue to encounter barriers to advancement in the workplace because of their sex. *EEOC v. Fox News Network, LLC* (S.D.N.Y. Aug. 10, 2006) presented claims that a 24-hour cable news channel with headquarters in New York City discriminated against female employees in assignments and promotions; subjected them to a sexually hostile work environment; and retaliated against women who complained. Defendant's male Vice President of the Advertising and Promotions Department generally assigned newly-hired men into staff positions while assigning women with similar qualifications to freelance positions (with fewer benefits, less advancement potential, and less job security), and rarely promoted women freelancers into staff positions while usually promoting male freelancers. Moreover, on a daily basis, the Advertising Vice President subjected women on his staff to sex-based vulgar, degrading, and hostile language. After a female employee complained to the Human Resources Department about the Vice President's abusive conduct, he intensified his demeaning treatment and isolated her (excluded her from meetings and told other employees not to talk to her), causing her resignation. The Vice President threatened other women with similar treatment if they complained. Under the consent decree resolving this case, $225,000 in monetary relief will be allocated among four women as

determined by EEOC. Defendant is required to provide EEOC approved employment discrimination training annually to all employees, using a specifically designed module for managers and supervisors and providing two additional, individualized sessions for the Vice President of Advertising and Promotions. The decree prohibits defendant from engaging in sex discrimination, sexual harassment, or retaliation.

In *EEOC v. Newman University* (D. Kan. March 13, 2006), EEOC alleged that defendant, a Catholic liberal arts school in Wichita, Kansas, refused to promote a woman to Vice President of Enrollment Management (VP-Enrollment) because of her sex, and demoted her in retaliation for her complaints about sex discrimination. When defendant's VP-Enrollment resigned, the Dean of Admissions, a woman with over 12 years of experience with defendant, immediately began performing the VP-Enrollment's duties along with her own. Despite university policy requiring internal posting before jobs could be advertised externally, defendant failed to internally post the VP-Enrollment position. The Dean of Admissions nonetheless applied to the external announcement. The school's male President subsequently told her that none of the applicants had been qualified, and that he was going to bring in a consultant. The Dean of Admissions confronted the President with two instances in which he had expressed an intention to hire men for management positions, including the VP-Enrollment job, and told him she knew filling the VP-Enrollment position would "come down to gender." Nine days after EEOC mailed the Dean of Admissions' sex discrimination charge to defendant, and 3 days after the male consultant began work as the Interim VP-Enrollment, the Dean of Admissions' title was changed to Director of U.S. Admissions and her former duties were reduced substantially. She resigned the following day. Under the consent decree resolving this case, the former Dean of Admissions received $182,000 in monetary relief. Defendant will place copies of her discrimination charge and the consent decree in the former President's permanent personnel file (the President resigned 3 months after EEOC's suit was filed). The decree prohibits defendant from engaging in sex discrimination or retaliation.

b. Pay

Both Title VII and the Equal Pay Act of 1963 (EPA) prohibit pay discrimination on the basis of sex between employees performing substantially similar work, and under the EPA it is not necessary to show discriminatory intent. In *EEOC v. Cash & Go, Ltd.* (S.D. Tex. Oct. 17, 2005), EEOC alleged that a Texas company operating financial services kiosks in convenience stores paid female Area Managers less than similarly situated male Area Managers, in violation of Title VII and the EPA. Female Area Managers were paid from $4,000 to $9,000 a year less than male Area Managers they succeeded or replaced. Under the consent decree resolving the case, defendant paid seven women a total of $105,000 and raised the salaries of three current female employees. The decree enjoins defendant from engaging in any act that has the effect of discriminating against an employee on the basis of sex, and from permitting the unlawful payment of wages to employees of one sex at rates less than the rates paid to the other sex.

Title VII prohibits pay discrimination by entities with at least 15 employees, but the EPA covers smaller employers as well if they engage in interstate commerce. In *EEOC v. Vista*

Management Associates, Inc. (D. Col. Dec. 23, 2005), EEOC alleged that a Colorado condominium management company with fewer than 15 employees paid a female Property Manager less than men performing substantially equal work and retaliated against her for complaining about the work environment. Defendant hired the female Property Manager, who had a college degree in finance and some financial and accounting experience but had not managed property, at $30,000 per year. It paid the same salary to a male Property Manager who had no degree, no financial experience, and no property management experience. Within the next 10 months, defendant hired three men – one with significant property management experience and two with none – at $38,000, $38,000, and $35,000. When the female Property Manager informed defendant that she was aware of the pay disparity, her salary was raised to $31,500. However, when defendant learned shortly thereafter that she was preparing to submit her resignation and give 2 weeks notice, she was escorted from the premises. Three days later, she sent defendant's attorney a letter saying that she intended to seek legal action due to the hostile, abusive, and unprofessional work environment. Subsequently, defendant gave two prospective employers who called for references inaccurate and very negative information about her. Under the 3-year consent decree resolving this case, the former Property Manager received $41,800 in monetary relief. The decree prohibits defendant from discriminating against any employee in pay because of sex, and from retaliating against any employee for participating in the EEOC process.

4. Sexual Harassment

Approximately one quarter of Commission suits contain a sexual harassment claim of some kind. In spite of the widespread publicity these cases receive, the conduct shows no sign of abating. Many sexual harassment claims result from an employer's failure to monitor the conduct of low-level supervisors or to respond effectively to complaints about the conduct of coworkers and supervisors. But harassment by owners of businesses and other high-level officials is not uncommon, as illustrated by the first few cases discussed below.

EEOC v. Eastern Engineered Wood Products, Inc. (E.D. Pa. June 13, 2006) involved two consolidated lawsuits against an Allentown, Pennsylvania company that distributes lumber and other wood products. In one case, EEOC alleged that one of the male co-owners of the company (two brothers) subjected the male Vice President of Sales (VP) to sexual harassment, and that both owners retaliated against the VP for opposing the harassment, resulting in his constructive discharge. In the other case, EEOC alleged that the owners discharged the corporate President because he opposed the harassment of the VP. One of the owners repeatedly subjected the VP to unwelcome sexual conduct, including kissing, inappropriate touching, sexual comments, and requests for sexual favors. The owner offered to make the VP a corporate officer and to structure a bonus program for him, but demanded a sexual act in return. The VP refused and complained in writing to the President, who promptly commenced an investigation. After the investigation began, both co-owners berated the VP and President in front of staff and questioned their loyalty, and the President was told he would not receive his expected annual bonus (more than $500,000) because of anticipated litigation over the VP's sexual

harassment complaint. The investigation substantiated the harassment allegations, and the company's attorney recommended remedial measures. Although the culpable co-owner apologized to the VP by letter, defendant suspended both the President and the VP, the President for disloyalty and the VP for having refused to turn over his laptop computer as evidence. Shortly thereafter, defendant fired the President and the VP resigned. Under a consent decree resolving both suits, the VP and President will receive a total of $3.1 million in monetary relief.

In *EEOC v. Roswell Radio, Inc.* (D.N.M. April 13, 2006), EEOC alleged that the owner and President of a Roswell, New Mexico company that operates five radio stations, regularly directed crude sexual comments at three female managers and also frequently looked at pornography on the computer in his office, which employees could see when they came into the office. After the owner learned that one of the women was pregnant, he began making derogatory comments about her pregnancy to her and in front of customers. These comments increased as her pregnancy progressed, and when he significantly reduced her compensation, she resigned from her Account Executive position. A second woman was subjected to increased sexual harassment after a promotion to Sales Manager that required frequent contact with the owner, and she also resigned. After those resignations, the Business Manager/Human Resources Director, who had herself experienced sexual harassment on a daily basis, told the owner/President that his conduct toward women would get him into trouble. Two months later, he called her into his office and accused of her of encouraging the Account Executive to file an EEOC charge, which he had just received. She was fired several days after that incident. Under the consent decree resolving this case, the three women received a total of $280,000 in monetary relief. The decree enjoins defendant from subjecting any employee to sex discrimination (including harassment based on sex or pregnancy) and from retaliating under Title VII. In addition to attending training on sex discrimination required for all employees, the owner/President will attend at least six individual counseling sessions with a qualified counselor, therapist, or psychologist to acquaint him with the effects of actual or perceived sexual harassment upon the victim.

In *EEOC v. PAL Health Technologies, Inc.* (C.D. Ill. Nov. 30, 2005), EEOC alleged that a company which manufactures and markets orthopedic equipment subjected female employees at its Pekin, Illinois facility to sexual harassment and constructively discharged two of them. The President/CEO, who managed defendant from a Florida office, visited the Pekin office for 3 or 4 days every few weeks and kept in frequent contact with the Pekin employees by telephone. The CEO made sexually suggestive comments and crude references to body parts, used derogatory terms to refer to women, and touched women inappropriately. Although defendant investigated at least two complaints by female employees, it failed to take effective corrective action. Two female managers quit because of the sexual harassment. Under the consent decree resolving this case, defendant paid $350,000 in monetary relief to eight women named in the decree. The decree notes that the two women who were constructively discharged received monetary damages totaling $180,000 under a separate, private settlement agreement with defendant.

Teenagers may be particularly vulnerable to sexual harassment. Under the Commission's Youth@Work Initiative, EEOC has focused on remedying and preventing harassment and other discrimination against teen workers. Many of EEOC's cases involve the harassment of young women, and sometimes young men, in the setting of restaurants and retail establishments, typical of part-time jobs for teens. In *EEOC v. Rowtown, Inc., d/b/a The Fish Hopper Restaurant* (N.D. Cal. Nov. 21, 2005), EEOC alleged that a Monterey, California restaurant subjected waitresses and hostesses (some just 17 or 18 years old) to sexual harassment and retaliated against a waitress for complaining about the harassment. The female employees' male supervisors and coworkers engaged in severe and pervasive physical and verbal sexually offensive conduct. Defendant initially took no action in response to a waitress' complaints about a coworker who subjected her to an escalating course of harassment over about 4 months. Defendant finally fired the employee after he came up behind the waitress, grabbed her breasts, and kissed her on the cheek. After terminating the man, defendant disciplined the waitress three times in 2½ weeks, and warned her that additional discipline would lead to termination. Due the continuing harassment and the retaliatory disciplinary actions, the waitress quit, feeling she had no choice. Under the consent decree resolving this case, defendant paid seven claimants a total of $200,000 in monetary relief, in individual amounts determined by EEOC.

In *EEOC v. Pand Enterprises, Inc., d/b/a McDonald's Restaurant* (D. N. Mex. March 7, 2006), EEOC alleged that a company that owns and operates six McDonald's restaurants in Albuquerque, New Mexico subjected male teenage crew members as young as age 15 to sexual harassment, and retaliated against one of them for complaining about the harassment. A male swing supervisor at one of the restaurants subjected teenage male employees to daily offensive conduct, such as touching, sexual remarks, and sexual propositions. The employees complained to supervisors and to the store manager, but defendant failed to take effective steps to stop the conduct. For example, when one employee met with the restaurant manager about the harassment, the manager made light of his complaints and ignored his suggestion to view the store videos to see the conduct firsthand. A few weeks later, the employee sent defendant a five-page letter written in Spanish detailing the harasser's conduct and 2 days later filed a charge with the EEOC. Defendant reduced the employee's work hours by half after receiving notice of the charge. Under the consent decree resolving this case, four individuals shared $90,000 in compensatory damages. Defendant is enjoined at all six restaurants from sex discrimination and retaliation, and must adopt policies and procedures (detailed in the decree) for preventing and remedying sexual harassment and retaliation.

Sometimes harassment based on sex takes the form of hostility towards employees of a particular sex. In *EEOC v. National Education Assoc. and NEA-Alaska* (D. Alaska May 19, 2006), EEOC alleged that a national teacher's union and its local Alaska affiliate subjected three female employees in the local's Anchorage office (a trainer/organizer and two office support staff) to a sexually hostile work environment and constructively discharged one of them. The national union helped place a male employee into a high-level management position at the Alaska local despite his record of abusing women when he worked at two other union affiliates. The male manager regularly subjected women in the Anchorage office to verbal abuse and intimidation (including screaming and shaking

his fist in their faces), though he rarely raised his voice to male employees. The district court dismissed the case on the grounds that the manager's behavior was not overtly sexual and thus not unlawful sexual harassment. On appeal, the Ninth Circuit reinstated the suit, ruling that harassing conduct does not have to be motivated by lust or misogyny to be illegal sex discrimination. The case was then resolved through a consent decree under which the three women received $750,000 in monetary relief. The decree contains a number of provisions designed to promote information-sharing between the national union and its state affiliates regarding complaints made against affiliate executive directors, and requires executive directors' attendance at affiliate antiharassment training programs for managers and supervisors.

Sexual harassment can rise to the level of criminal conduct. In *EEOC v. Kmart Corp., a subsidiary of Sears Holding Corp.* (E.D. Pa. Sept. 21, 2006), EEOC alleged that a 16-year-old part-time cashier at defendant's Norristown, Pennsylvania Kmart store was raped in the store's stockroom by her 20-year-old male supervisor. The employee was examined at the hospital the next day and filed a criminal complaint against the supervisor. The employee's mother called a store manager and told her that her daughter had been sexually assaulted by her supervisor and would not return to work. Although the police arrested the man in the store a week after the assault, defendant did not terminate him until over 2 months later when he was arrested for assaulting a second Kmart employee on the job. The female employee received $295,000 in monetary relief under the consent decree resolving this case. The decree prohibits sex discrimination and retaliation.

In *EEOC v. Sterling Construction Services, Inc.* (D. Md. Dec. 27, 2005), a contractor performing construction cleanup work in the Washington, D.C. metropolitan area hired a recent immigrant from El Salvador with limited English skills to do cleaning at the Pentagon on the evening shift. Her supervisor soon began making sexual advances, which she rejected. Three months after she started work, the supervisor sexually assaulted her twice over a period of a few days. She escaped during the second assault and filed a police report. She did not return to her job because of the trauma and her fear that the employer would not protect her from further harm. The supervisor pled guilty to abusive sexual conduct and was sentenced to 2 years in prison. Under the consent decree resolving this case, the employee received $85,000 in monetary relief. The decree enjoins defendant from sex discrimination, sexual harassment, and retaliation, and requires that defendant adopt a revised and strengthened antiharassment policy, which will be distributed to all employees in English and in a Spanish language translation for Hispanic workers.

EEOC has focused in particular on situations in which there are multiple victims of a sexually hostile work environment, obtaining significant monetary recoveries as well as broad-based equitable relief calculated to improve the working environment and prevent future harassment. These cases include: *EEOC v. Valentino Las Vegas, LLC, Valentino Santa Monica, LLC, Giorgio Café & Ristorante* (D. Nev. Oct. 13, 2005) (Group of related Italian restaurants paid $600,000 to five women harassed by supervisors at its Las Vegas location); *EEOC v. Restaurant Concepts II, LLC, d/b/a Applebee's Neighborhood*

Grill and Bar (D.N.M. Oct. 26, 2005) (Operator of Applebee's restaurant in Santa Fe, New Mexico paid $310,000 to seven female servers harassed by a male coworker (bartender), where defendant terminated one of the servers after her second complaint about the harassment; defendant is enjoined at all facilities from sex discrimination, sexual harassment, and retaliation); *EEOC v. Nine West Footwear Corp. and Jones Apparel Group, Inc., successor in interest* (S.D.N.Y. May 16, 2006) ($600,000 paid into a claims fund to be distributed by EEOC to female employees who were subjected to sexual harassment, national origin harassment (Hispanic), or retaliation by two top managers at defendant's Esprit division in White Plains, New York; defendant is enjoined from national origin and sex discrimination); *EEOC v. Wal-Mart Stores, Inc.* (M.D. Fla., June 29 and Aug. 31, 2006) ($315,000 paid to three female employees in two suits involving harassment by managers at a Wal-Mart Store in Bradenton, Florida; defendant is enjoined at the store from sexual harassment and retaliation); *EEOC v. Foodcrafters Distribution Co.* (D.N.J. Sept. 8, 2006) ($384,500 paid to five female office employees of a national food distributor who were harassed by male managers at its Pennsauken, New Jersey trucking terminal; defendant is enjoined from sexual harassment and retaliation); *EEOC v. Harman-Chiu, Inc., d/b/a KFC/Taco Bell* (N.D. Cal. Sept. 26, 2006) ($349,800 in monetary relief for five women who were harassed by a male fast food restaurant manager and had their hours cut for complaining about the harassment; defendant is enjoined from sex discrimination, sexual harassment, and retaliation and the manager must issue a letter of apology).

5. Disability Discrimination

a. Hiring and Promotion

Individuals with disabilities frequently encounter attitudinal barriers when seeking employment. *EEOC v. Procel International Corp., d/b/a Procel; Procel Temporary Services, Inc.* (C.D. Cal. Oct. 6, 2005) presented a claim that a staffing agency that places nurses and other licensed medical support personnel in acute care facilities refused to hire an applicant for a part-time instrument technician position because of her disability. The applicant was born deaf and communicates in writing and through sign language. She had 8 years experience as an instrument technician and was working in that position at a teaching hospital. (Instrument technicians sterilize and set up surgical instruments in hospital operating rooms and other settings, following written instructions.) After a number of unsuccessful attempts to contact defendant due to defendant's employees' inexperience with handling TTY relay calls, the instrument technician was connected to defendant's surgical services supervisor who told her she could not apply for any position if she had a disability. Under a consent decree resolving this case, defendant paid the applicant $130,000 in compensatory damages, and was enjoined from discriminating on the basis of disability or failing to reasonably accommodate an individual with a disability.

In *EEOC v. Spherion Corp.* (W.D. Tex. Aug. 21, 2006), EEOC alleged that a nationwide company that provides recruiting, staffing, and outsourcing services failed to reasonably accommodate two deaf applicants during the application process and refused to hire them because of their disabilities. The deaf applicants appeared at defendant's facility in

Austin, Texas in response to an advertisement for entry level assembly positions. Defendant gave the other applicants application forms, but told the two deaf applicants that it would call them after making arrangements for a sign language interpreter to assist them. Over the next several months, the applicants contacted defendant several times (via TTY relay service and email) about applying. Defendant's representative told them by email that due to the cost of a sign language interpreter defendant would not provide an interpreter until it had at least six deaf applicants. The resulting suit was resolved by a consent decree under which the two deaf applicants received a total of $78,300 in monetary relief. The decree requires defendant to modify its reasonable accommodation policy to provide hearing-impaired applicants with: (1) an interpreter as soon as possible upon request; (2) if an interpreter is not requested, a written interview and extra time to complete any tests; and (3) an interpreter during training, without a formal request or any delay in training compared to hearing individuals. Defendant is also required to distribute a printed form to all deaf applicants that asks about their preferred method of communication and provides a means for them to request the services of a sign language interpreter in the application and training processes.

In *EEOC v. Americall Group, Inc.* (N.D. Ill. Dec. 1, 2005), EEOC alleged that a telemarketing firm with locations in four states and two foreign countries failed to hire an applicant for a telemarketing service representative (TSR) position at its Lansing, Illinois facility because she was blind and used a guide dog. The applicant passed a "pre-screen" by telephone and was invited for a group interview, which she attended with a reader and her guide dog. Although she successfully completed a grammar and listening examination, and the interview went well, defendant rejected her for the position, explaining in a letter that the "facility is not conducive for a seeing eye dog." After she filed a disability discrimination charge, defendant hired her as a TSR and permitted her to bring her guide dog to work. She successfully performed the job using adaptive computer software. Under the consent decree resolving the case, the blind applicant received $200,000 in monetary relief, consisting of $191,000 in compensatory damages and $9,000 in backpay. The decree enjoins defendant from disability discrimination.

In *EEOC v. SSM Healthcare St. Louis owning and operating SSM Rehab* (E.D. Mo. July 20, 2006), EEOC alleged that defendant, which owns and operates health care facilities, refused to renew a physician's contract because she was disabled due to multiple sclerosis (MS). The physician, who was diagnosed with MS in medical school, is incapable of standing or walking unaided, and uses a motorized wheelchair. After a year with defendant, she was selected to be the medical director of SSM Rehab, a new orthopedic rehabilitation unit in Richmond Heights, Missouri. The new unit was understaffed and relied heavily on temporary employees. The physician frequently complained that she had to work many extra hours to insure quality patient care. About 90 days before her 2-year employment contract was due to expire, she informed SSM Rehab's President that she wanted to terminate her existing contract and enter into a new one reflecting the greater effort and responsibilities of her new position. Shortly thereafter, she was hospitalized briefly for extreme fatigue. While recuperating at home, and at the urging of her colleagues, she wrote the President clarifying her wish to keep her job, but on different contract terms including accommodations for her disability.

When she returned from medical leave, the President refused to renew the contract or give her a new one. According to defendant's former Director of Professional Services, the President had expressed concerns about the physician's ability to do the job with MS. Under the consent decree resolving this case, the physician received $125,000 in monetary relief. SSM Healthcare is prohibited from discriminating on the basis of disability. Prior to denying any written request for accommodation made during the 3-year term of the decree, SSM Rehab will contact the Job Accommodation Network for assistance.

In *EEOC v. Hollywood Entertainment Corp.* (D. Idaho March 10, 2006), EEOC alleged that a video rental store in Ammon, Idaho, failed to promote an employee from a service representative to a shift leader position and constructively discharged her because of her hearing impairments (no hearing at all in one ear and approximately 50% speech discrimination, with a hearing aid, in the other). During her 4 years with defendant, the employee had consistently received high ratings for her job performance and two former store managers said she was qualified for the shift leader position. Defendant regularly promoted less senior employees, and after the store manager again reneged on a promise to promote her, she told the manager that she intended to challenge the discrimination. In response, the manager threatened to cut her hours, make her job miserable, and "make sure that [she] never got another job in this town again." The employee resigned 2 days later and filed a discrimination charge. Under the consent decree resolving this case, she received $70,000 in monetary relief, and defendant was enjoined from engaging in discrimination or retaliation.

b. Reasonable Accommodation

The failure of employers to reasonably accommodate the limitations of qualified individuals with disabilities, and discharges resulting from those failures, continue to constitute a significant portion of EEOC's ADA litigation docket. During the fiscal year, the Commission prevailed in two jury trials involving these issues. In *EEOC v. Convergys Customer Management Group, Inc.* (E.D. Mo. April 14, 2006), defendant, a national provider of outsourced customer services, failed to reasonably accommodate a Hazelwood, Missouri customer service representative's disability, brittle bone disease, and discharged him because of his disability. The employee is unable to bear weight on his legs and must use a wheelchair, which made it difficult for him to use the bathroom, purchase and eat his meals, and get back to his work station within defendant's 30-minute meal period. Defendant refused to allow the employee a longer meal period as a reasonable accommodation and discharged him for excessive tardiness after 18 months of otherwise successful job performance. Following a 5-day trial, the jury returned a verdict for EEOC, awarding the customer service representative $14,265 in backpay and $100,000 in compensatory damages. In *EEOC v. Federal Express Corp.* (D. Md. March 3, 2006), EEOC alleged that defendant failed to reasonably accommodate an employee's deafness and discharged him in retaliation for filing a charge of discrimination. The employee has been profoundly deaf since birth, does not use hearing aids or read lips, and primarily uses American Sign Language to communicate. From the time of his hire as a package handler at defendant's facility in the Baltimore-Washington International Airport, he regularly requested a professional sign language interpreter and written notes

for meetings defendant held on safety, security, and other matters. Defendant did not provide the employee with an interpreter until more than 2 years after his hire and then did so for only some meetings. The employee was discharged a month after his supervisor learned he had filed a discrimination charge, but defendant introduced evidence at trial that the employee had over two dozen absences during the final year of his employment and that it had used a progressive discipline policy in discharging him. Following a 4-day trial, the jury returned a verdict for EEOC on the failure to accommodate claim, and for defendant on the retaliatory discharge claim. The jury awarded $8,000 in compensatory damages and $100,000 in punitive damages on the accommodation claim.

Other failure to accommodate cases were resolved by consent decree. In *EEOC v. The Home Depot USA, Inc.* (E.D.N.Y. Oct. 17, 2005), EEOC alleged that a national retailer of building materials and home improvement products violated the ADA by failing to provide a sales associate at its South Setauket, New York store with a reasonable accommodation and by discharging her because of her disability -- mild mental retardation that substantially limits her in learning. The employee obtained her job at Home Depot through a program sponsored by New York's Office of Vocational and Educational Services for Individuals with Disabilities, which assigned a coach to assist her in learning to perform her job. Defendant discharged her 5 months later for failing to report to work as scheduled on three consecutive weekends. According to the employee and her father, unidentified persons instructed her over the phone not to show up on those weekends. Defendant discharged the employee even though it knew of her claim that she was instructed not to come to work, and without communicating with her job coach. Defendant paid the former sales associate $75,000 in damages to resolve the case, and agreed in a consent decree to maintain policies prohibiting disability discrimination, including a policy entitled "Reasonable Accommodation" and another entitled "Working With a Job Coach" (which explains the roles of the job coach and Home Depot Management in working with disabled employees).

In *EEOC v. Sears Roebuck and Co., Inc.* (N.D. Ill. July 10, 2006), EEOC alleged that a national department store chain failed to reasonably accommodate a part-time sales clerk at its River Oaks Mall store in Calumet City, Illinois who was substantially limited in walking. In her complaint-in-intervention, the employee also alleged that she was constructively discharged. After 2 years of employment at the store, the employee began experiencing numbness in her right leg and could not walk very far without pain. Her physician diagnosed her with neuropathy (nerve damage) and advised her to avoid walking for prolonged periods and for long distances. The employee sought accommodations to reduce the distance she had to walk to get to her job (a closer parking space and permission to walk through the stockroom) and to eat lunch (permission to eat in the stockroom). Defendant denied her requests and she therefore resigned. Under the consent decree, the former sales clerk will receive $150,000 in monetary relief, and defendant is enjoined at the River Oaks store from discriminating against employees on the basis of disability and from failing to make a reasonable accommodation for any employee with a disability.

c. Terms and Conditions of Employment

Employees with disabilities are sometimes mistreated in the workplace due to their impairments or their attempts to assert their rights. *EEOC v. Exelon Generation, LLC* (N.D. Ill. Oct. 5, 2005), involved three separate lawsuits challenging discriminatory terms and conditions of employment at Illinois nuclear power stations owned by defendant. The *Byron Station* suit challenged defendant's policy of barring employees with temporary or permanent work restrictions from overtime eligibility, training, and promotions. The suit encompassed individuals with impairments that included diabetes, back and other orthopedic impairments, and heart disease. The *Braidwood Station* suit alleged that an employee was denied overtime due to his back impairments. The *Quad Cities Station* suit alleged that the defendant failed to accommodate an individual's fibromyalgia and disciplined and discharged him because of his disability. Under three separate consent decrees simultaneously resolving these suits, six individuals received a total of $285,000 in damages. The decrees also enjoin defendant from disability discrimination or retaliation at the three nuclear power stations, and require that the stations maintain the confidentiality of employee medical records.

In *EEOC v. LaBranche & Co., Inc.* (S.D.N.Y. Aug. 11, 2006), EEOC alleged that a securities firm performing specialist and market making activities for over 670 companies subjected a trading assistant working on the floor of the New York Stock Exchange to harassment based on his disability, bipolar disorder, and constructively discharged him in retaliation for complaining about the harassment. When word spread that the employee had been hospitalized, one of his supervisors and several coworkers began making pejorative comments to him regarding his mental state. The employee asked other supervisors for help curbing the persistent and disturbing comments, but to no avail. He finally complained to the Director of Human Resources, who held a meeting with the employee, the culpable supervisor, and defendant's CEO to discuss the problem. After the meeting, the supervisor accosted the employee and together with the CEO threatened to make his life difficult if he sued the company. When the employee's attorney sent a letter to defendant complaining about its conduct, the supervisor again threatened him and began intensely scrutinizing his work, causing him to resign. Under the consent decree resolving the case, the former trading assistant received $500,000 in monetary relief. The decree enjoins defendant from discriminating against or harassing any employee because of the employee's disability, and from retaliation.

In *EEOC v. Luby's, Inc.* (D. Ariz. April 19, 2006), EEOC alleged that the defendant restaurant chain harassed a developmentally disabled employee, retaliated against her for complaining about her treatment, and constructively discharged her due to the disability harassment and retaliation. The employee was hired to work as a floor attendant, which involved cleaning tables and bathrooms, carrying dishes to the dishwasher, and filling condiment bottles. She is substantially limited in learning and speaking and has a job coach. Initially, the restaurant manager provided her with needed accommodations and she performed her job successfully. However, when a new restaurant manager took over, he refused to repeat instructions, berated her, told her to "shut up" when she asked about her job duties, and got impatient and angry with her for working and speaking slowly. The new manager also allowed the employee's coworkers to mistreat her, including mimicking her speech, teasing her about her stutter, barking at her, and threatening to

hurt her with a bread slicer. The employee's job coach and family complained to defendant's District Manager and called defendant's 800 hotline number, but the harassment continued. The employee resigned after receiving a written counseling report criticizing her for asking a question about a work assignment. Under the consent decree resolving the case, defendant paid $90,000 in compensatory damages to the employee and $60,000 to the Arizona Center for Disability Law, which represented her in intervening in EEOC's suit.

6. Age Discrimination

a. Downsizing and Restructuring

It is illegal for an organization to take age into account in reducing or "restructuring" its workforce, but this often happens. The following are some representative resolutions from this fiscal year.

In *EEOC v. Thermal Foams, Inc.* (W.D.N.Y. April 13, 2006), EEOC alleged that a manufacturer of packaging and insulation products located in Buffalo, New York laid off five production employees based on their ages, ranging from 48 to 61. Prior to the layoff, defendant had 27 production employees between the ages of 19 and 66. It laid off 5 out of 16 employees in the protected age group (PAG, age 40 and older), but none of the 11 non-PAG employees. With the exception of a part-time employee who had previously retired, the five claimants were defendant's oldest production employees. Under the consent decree resolving the case, the claimants will collectively receive $130,600 in monetary relief ($23,600 in lost wages, $41,700 in lost benefits, and $65,300 in liquidated damages). In addition to prohibiting age discrimination and retaliation, the decree requires defendant to provide its President, Plant Manager, and other employees who have hiring or termination authority with training on the ADEA's requirements, including how to conduct a nondiscriminatory reduction-in-force.

In *EEOC v. Lennar Homes of Arizona, Inc.* (D. Ariz. July 18, 2006), EEOC alleged that a subsidiary of a major U.S. homebuilder discharged three sales consultants, ages 55, 56, and 60, and similarly-situated employees based on age. The claimants sold residential property at new communities in Arizona and were terminated after the communities to which they were assigned sold out. Defendant's prior practice had been to transfer such employees to new communities. Defendant claimed that it needed to reduce staff, and that it terminated the claimants because they were poor performers. However, defendant's performance evaluations and sales records reflected that the employees were in fact highly productive. Moreover, shortly after the terminations, defendant hired younger, less experienced individuals as sales consultants. Under a consent decree, the five claimants will share $425,000 in monetary relief (one-half designated as backpay and one-half as liquidated damages).

In *EEOC v. Maytag Corp.* (N.D. Ill. Dec. 2, 2005), EEOC alleged that a manufacturer of household appliances based in Newton, Iowa, demoted charging party and similarly-situated regional sales managers (RSMs) over age 50 during a 1999 national restructuring, and denied them reinstatement during a further restructuring in 2001,

because of their ages. In the original restructuring, defendant reduced the number of RSMs nationwide, downgrading a disproportionate number of individuals in the protected age group into zone operations manager positions. In 2001, defendant created new RSM positions and promoted disproportionately fewer employees over age 50 into the new positions. As a result of the reorganizations, the percentage of individuals above age 50 in Maytag's RSM ranks nationally plummeted from 41% (9 out of 22) in 1999 to 12% (2 out of 17) in 2001. The consent decree provides three individuals with a total of $334,000 in monetary relief. The decree enjoined defendant from violating the ADEA, and required defendant's Vice President for Human Resources to meet with the Director of EEOC's Chicago District Office within 90 days to discuss Maytag's compliance with U.S. EEO laws.

EEOC v. County of Bergen (D.N.J. March 10, 2006) presented a claim that defendant terminated older Assistant County Counsels because of their ages. Two days after being appointed, the new Bergen County Counsel terminated the five oldest Assistant County Counsels, ages 39, 42, 47, 59, and 63, purportedly in a reorganization. The new County Counsel retained four incumbent Assistant County Counsels, and within weeks hired three new Assistant County Counsels younger than age 40. Defendant was unable to articulate the criteria used in selecting individuals for termination. Under a consent decree resolving this case, defendant paid $250,000 in monetary relief to three former Assistant County Counsels over age 40. The decree enjoins defendant from discriminating against employees and applicants based on age and from engaging in practices that retaliate under the ADEA.

b. Age-Based Policies

In *EEOC v. Paul Hall Center for Maritime Training and Education, and Seafarers International Union* (D. Md. Nov. 14, 2005), EEOC alleged that defendants discouraged individuals age 40 and older from applying for, and denied them admission to, their apprenticeship program for deep sea merchant seafarers and inland waterways boatmen. Graduates of the program become eligible for membership in the Seafarers Union, which places many of them with cooperating shipper-employers. Until June 2002, one of the eligibility criteria for admission was being "between the ages of 18 through 25." According to the suit, after defendants dropped the age limit from the application form, they nonetheless continued to exclude applicants in the protected age group. The lawsuit was resolved through a 5-year consent decree that followed defendants' unsuccessful interlocutory appeal to the Fourth Circuit Court of Appeals challenging EEOC's 1996 regulation extending the age discrimination prohibitions of the ADEA to all apprenticeship programs. On January 7, 2005, the appeals court ruled that EEOC's regulation was a valid exercise of the agency's rulemaking authority. Under the decree, the defendants will pay aggrieved individuals identified by the EEOC $625,000 in compensation for wages they would have earned from shipboard jobs had the apprenticeship training program been available to them. The decree enjoins defendants from imposing any upper age limit in recruiting applicants for or admitting them to the apprenticeship program. It also enjoins defendants from discriminating based on age against individuals who inquire about the program, apply for the program, or are enrolled in the program.

EEOC has filed several suits against Minnesota school districts alleging that their early retirement incentive plans, adopted pursuant to a State statute, provided lower benefits to older workers based on age. In *EEOC v. Independent School District No. 834 of Stillwater, Minnesota* (D. Minn. Aug. 18, 2006), EEOC alleged that defendant's early retirement incentive plan for teachers and principals discriminated on the basis of age by reducing benefits for those who retired at older ages. The teachers' plan provided for 8 days pay for each year of service, with the total number of days capped based on age, ranging from 193 days at age 55 or below to 68 days at age 64. The principals' plan provided for 9 or 10 days pay for each year of service, with the retiree receiving the entire amount at age 55, gradually reduced to 26% at age 64. In both plans, the incentive was eliminated entirely for persons age 65 and over. This case was resolved through a consent judgment, under which 58 former teachers and principals received a total of $1,124,518 in monetary relief ($792,673 in early retirement incentive benefits and $331,845 in interest). The judgment prohibits defendant from implementing or administering any retirement incentive plan that reduces benefits based on age or on continued employment beyond the employee's date of first eligibility. Three similar cases against Minnesota school districts were resolved during the year. The method for calculating benefits differed in the respective early retirement plans, but each plan reduced benefits based on age. In each case, the aggrieved individuals were paid the money they lost due to the reduced benefits, plus interest, and a consent judgment was entered prohibiting the school districts from implementing or administering any similarly discriminatory retirement incentive plan. *EEOC v. Indep. Sch. Dist. No. 196 of Rosemount, Minn.* (D. Minn. Oct. 12, 2005) ($188,524 in backpay and interest); *EEOC v. Indep. Sch. Dist. No. 271 of Bloomington, Minn.* (D. Minn. Oct. 14, 2005) ($555,935 in backpay and interest); *EEOC v. Indep. Sch. Dist. No. 761 of Owatonna, Minn.* (D. Minn. Nov. 3, 2005) ($361,963 in backpay and interest).

In *EEOC v. Austrian Airlines* (E.D.N.Y. Jan. 8, 2006), EEOC alleged that an international airline fired the Director of Sales at its Queens, New York office because of his age, 51, and in retaliation for protesting age discrimination. Defendant's Austrian General Manager told the Director of Sales that he wanted to get rid of older workers and named two employees, ages 62 and 69, whom he thought should be fired. A few weeks after the Director of Sales advised the General Manager that under United States law it was illegal to fire employees based on age, the General Manager discharged him without warning and replaced him with a 32-year-old. Defendant had rated the Director of Sales highly in its only written review of his performance and failed to follow its progressive discipline policy in firing him. In a consent decree, defendant agreed to pay the former Director of Sales $500,000, half as backpay and half as liquidated damages. Defendant also agreed to adopt an antidiscrimination policy and complaint procedure approved by EEOC, which would be distributed as part of antidiscrimination training for all sales and marketing managers with authority to make hiring decisions within the United States.

7. Religious Discrimination

a. Bias

It is illegal to favor particular religions in the workplace or to denigrate an employee's religious beliefs. In *EEOC v. Applegate Holdings Co. and Advance Employment Services of Mt. Pleasant, Inc.* (W.D. Mich. April 10, 2006), EEOC alleged that defendants' discriminated against employees based on religion (non-Evangelical Christian) and sex (female) in their terms and conditions of employment and created a religiously and sexually hostile work environment. Defendant Applegate Holdings operates six manufacturing plants which produce commercial landscape products, and for which Advance Employment Services (Advance) provides human resources and payroll services. All staff at Applegate were paid as employees of Advance. Applegate's owner, a self-ordained minister, distributed articles espousing his religious views on women's subordination to men and other topics. He handed them to employees and stapled them to their paychecks. He asked employees if they were Christian and encouraged them to attend his church, and told some male employees that their wives should be at home caring for their children or should not hold positions of responsibility. Applegate's Director of Finance and Administration repeatedly complained to the owner that she and other employees found the materials offensive. She also complained to an upper-level manager at Advance several times about Applegate's owner's behavior and faxed the Advance manager a particularly offensive article. The case was resolved through a consent decree under which affected individuals received $130,000 in compensatory damages, in individual amounts determined by EEOC. Both defendants were required to provide their owners, managers, and supervisors with mandatory training on federal EEO laws, including religious discrimination, sex discrimination, and harassment. Defendants were also required to develop, distribute, and implement an antidiscrimination policy containing procedures for complaining about discrimination directly to a management official at Advance.

In *EEOC v. Ranger Enterprises, Inc., and Reopco, Inc.* (N.D. Ill. July 19, 2006), EEOC alleged that a company which operates over 50 gas station/convenience stores (Ranger), and an affiliate providing management services (Reopco), terminated a Jewish accountant in Reopco's corporate headquarters in Rockford, Illinois due to her religion and in retaliation for resisting Christian overtures at work. Reopco employees were given the opportunity to meet with a pastor while at work. The accountant declined two offers to meet with a pastor, saying that she was Jewish. When she subsequently received a number of office emails with Christian content, she replied by email asking that she not receive similar emails in the future and stating that those types of communications made her uncomfortable because of her religious beliefs. Defendants discharged her 3 days later, ostensibly for poor performance, but without any documentation of performance deficiencies in her personnel file. Under the consent decree resolving this case, the former accountant received $30,000 in monetary relief. Defendants are enjoined from discriminating on the basis of religion and prohibited from retaliation under Title VII.

In *EEOC v. Lithia Subaru of Oregon City* (D. Ore. March 3, 2006), EEOC alleged that a car dealership in Oregon City, Oregon subjected an Iranian Muslim sales representative to a hostile work environment due to his national origin and religion, and discharged him because of his national origin and religion and in retaliation for complaining about the harassment. EEOC's complaint also alleged that defendant demoted and terminated a

Floor Manager for objecting to the treatment of minority employees in the workplace. After defendant acquired the Subaru dealership in February 2002, a new General Manager and a recently promoted General Sales Manager began subjecting the Iranian Muslim sales representative to a daily barrage of insults and epithets (e.g., "terrorist," "camel jockey"). After the Floor Manager complained to the General Manager about the treatment of minorities in the workplace, particularly the treatment of the Iranian Muslim sales representative, he was demoted to a sales position. A week later, he handed the General Manager and General Sales Manager a letter reiterating his concerns about the hostile work environment and 2 days later he sent a similar letter to an executive of defendant's parent company, Lithia Motors. A month later, he was given a disciplinary notice claiming he had made racist comments and then fired. Meanwhile, the Iranian Muslim sales representative had an argument with an employee who had been harassing him and both men were disciplined. He then sent a letter to Lithia management complaining of harassment, and shortly thereafter was disciplined for allegedly failing to follow costumer procedures and forced to resign in lieu of being fired. The case was resolved through a consent decree providing $360,000 in monetary relief and positive letters of reference for the two claimants. The decree enjoins defendant from discriminating in violation of Title VII.

b. Reasonable Accommodation

Title VII not only prohibits adverse treatment of employees due to their religious beliefs, but requires employers to reasonably accommodate employees' religious observances and practices unless doing so would impose an undue hardship on the employer's business. In most years, approximately half of EEOC's religious discrimination suits involve accommodation issues.

In *EEOC v. Alamo Rent-A-Car, LLC* (D. Ariz. May 26, 2006), EEOC alleged that a car rental business in Phoenix, Arizona failed to reasonably accommodate the religious practices of a Muslim rental agent and discharged her because of her religion. Defendant had a "Dress Smart Policy" which prohibited employees from wearing certain clothing and accessories. When the rental agent, a recent immigrant from Somalia, requested permission to wear a head covering at work during the Muslim Ramadan holiday, she was told she could wear a head covering while working in the back of the office, but had to remove it while working at the rental counter. The rental agent was counseled and sent home 2 days in a row for wearing a veil over her hair, was suspended the next day and then discharged for violation of company rules.

The court granted EEOC's motion for summary judgment on liability. The court found that the sincerity of the employee's belief that her religion required her to cover her head during Ramadan was demonstrated by her continuing to wear a head covering despite warnings from her supervisors that she would be subject to progressive disciplinary action. The court then rejected defendant's argument that allowing the rental agent to wear a head covering in the back office constituted a reasonable accommodation, finding that defendant still required her to serve clients but would not let her wear a head covering when doing so. The court also rejected defendant's undue hardship defenses. On defendant's claim that "any deviation from [its] carefully cultivated image is a definite

burden," the court concluded that such a claim was insufficient to raise a material issue of fact in the absence of any study indicating probable costs. The court also rejected defendant's argument that allowing the rental agent to wear a head covering would make its "Dress Smart Policy" unenforceable as to other employees, stating that "[u]nder this faulty reasoning, virtually no accommodation could overcome the undue hardship test." Following a trial on relief in FY 2007, a jury awarded the former rental agent $21,640 in backpay, $16,000 in compensatory damages, and $250,000 in punitive damages.

In *EEOC v. Kerr Drug, Inc.* (W.D.N.C. Feb. 15, 2006), EEOC alleged that a drug store chain operating in North and South Carolina failed to accommodate the religious observances of two Baptist pharmacy technicians working at its Franklin, North Carolina store and terminated them because of their religion. The pharmacy technicians, who are sisters, believe their religion requires attendance at two services each Sunday and one each Wednesday evening. Defendant accommodated them during their first year of employment, but then instituted a less flexible rotational schedule and assigned both women to work on Sundays. The pharmacy manager found an employee willing to swap for one of the Sunday shifts, but defendant refused the substitution and fired both women for refusing to work as scheduled. The consent decree resolving this case provided the former pharmacy technicians with $65,000 in monetary relief and positive letters of reference. Defendant is prohibited from engaging in discrimination based on religion, and is required to adopt and distribute written procedures for addressing employees' requests for religious accommodation.

In *EEOC v. Guaranteed Auto Finance, Inc., dba Auto Master* (W. D. Ark. March 15, 2006), EEOC alleged that an Arkansas used car dealership failed to accommodate the religious observances of a salesperson at its Springdale, Arkansas location and constructively discharged him due to his religion, Seventh Day Adventist. Defendant is open from Monday through Saturday, and the salesperson, who had worked at the dealership for over 5 years, had been off on Wednesdays. In April 2004, he began attending seminars conducted by a Seventh Day Adventist minister. As a result of these seminars and studying the Bible, the salesperson determined that his religious beliefs required him to observe Saturday as his Sabbath, and he therefore advised defendant that he could no longer work that day. He supported his request with a letter from his pastor and a copy of EEOC's Guidelines on Religious Accommodation. He worked the first Saturday after making his request, but when defendant still hadn't responded, he called in sick the second Saturday. He quit after being told that he would be disciplined (suspended and terminated) if he did not continue to work Saturdays. Under the consent decree resolving this case, the former salesperson received $55,000 in monetary relief. The decree requires defendant to provide reasonable accommodations to the sincerely held religious beliefs of its employees unless to do so would constitute an undue hardship. .

EEOC v. Ohio Civil Service Employees Assn, AFSCME, Local 11, AFL-CIO (S.D. Ohio Sept. 5, 2006) presented allegations that the Ohio Civil Service Employees Association (OCSEA) failed to provide reasonable accommodations to State employees with sincerely held religious objections to joining or supporting labor organizations. The U.S.

Department of Justice filed a related action against the State of Ohio and other State entities, and the cases were consolidated. Defendants allowed employees whose objections to joining or financially supporting unions are based on their membership in churches which historically have held conscientious objections to unionization to pay an amount equivalent to their union dues to nonreligious charities, but denied this accommodation to employees who are not members of such churches. An employee of the Ohio Environmental Protection Agency (EPA) who believes that he should not join or financially support unions "based on his reading and understanding of the Bible and a reformed theology to which he prescribes," was denied permission to pay an amount equivalent to his union dues to a charity because he was not a member of an authorized church. The consolidated cases were resolved through a joint consent decree under which defendants will grant the Ohio EPA employee's accommodation request and OCSEA will redirect the dues he paid to OCSEA since June 2002 (not to exceed $3,500) to a mutually agreed upon charity. The decree enjoins the State and OCSEA from: (1) denying substituted charity accommodations to State employees who hold sincere religious objections to associating with and/or financially supporting an employee organization such as OCSEA, whether or not they are members and adherents of religions that historically have held conscientious objections to joining or financially supporting employee organizations; and (2) retaliating against or taking any action that adversely affects the terms and conditions of employment of any person because that person has requested a religious accommodation concerning payment of union dues. The State and OCSEA incorporated the same Religious Accommodation Procedure into their current collective bargaining agreement.

8. Retaliation

All of the statutes enforced by EEOC prohibit discrimination for opposing conduct that violates a statute, or for participating in EEO investigative or enforcement proceedings. The first group of retaliation resolutions discussed below involve opposition or participation on the employee's on behalf; the second involve nondiscrimination efforts on behalf of others.

a. Assertion of Employee's Own Rights

In *EEOC v. Macalester College* (D. Minn. Dec. 8, 2005), EEOC alleged that a private undergraduate liberal arts college in St. Paul, Minnesota failed to renew a teacher's contract because he made an internal complaint of race and sex discrimination. Defendant employed the teacher, a white male, as a visiting professor of physics on a series of one-year contracts. During his third year at the school, he applied for a tenure-track position and was not selected, but defendant renewed his contract for a fourth year. After the new academic year began, the teacher complained to the Provost that race and sex discrimination were factors in the decision to reject him for the tenure-track position. The Provost assured him that the selection process had been fair and then told him that according to college policy, visiting faculty who apply for and do not receive tenure track offers are not rehired, and that his contract renewal had been an error. Defendant did not renew the teacher's contract for a fifth year. Defendant paid the teacher $125,000 in monetary relief under a consent decree which prohibits defendant from engaging in

retaliation under Title VII. Defendant is required to provide written notification to the school's President and other top administrators of the suit's resolution and of the availability of the consent decree for inspection.

EEOC v. First Health Group Corp. (N.D. Ill. Nov. 10, 2005) presented a claim that a nationwide managed healthcare company headquartered in Downers Grove, Illinois demoted and discharged a national accounts manager in retaliation for filing an age discrimination charge. Defendant had given the national accounts manager satisfactory performance reviews before he filed his charge, but fired him 9 months after the charge was resolved through the Commission's mediation program. Several months after the mediation, defendant gave the national accounts manager a "does not meet expectations" rating on his performance review and placed him on a 90-day PIP (performance improvement plan). A week after the PIP concluded, he was demoted to senior account manager, and 3 months later he was discharged. Under the consent decree resolving this case, the former national accounts manager received $122,500 in monetary relief and defendant is prohibited from engaging in retaliation.

In *EEOC v. Richmond of New York (d/b/a Richmond Children's Center)* (S.D.N.Y. Sept. 11, 2006), the Commission alleged that a nonprofit organization that provides rehabilitation services for people with disabilities at 11 facilities discriminated against 2 African American employees because of their race (denial of promotion, unfair discipline, and termination) and retaliated against employees for complaining about racial discrimination at defendant's main facility in Yonkers, New York. Defendant gave a negative evaluation to an African American licensed practical nurse who complained about racial double standards in promotion decisions, disciplined her for trivial incidents, and increased her workload; terminated an African American Child Care Tech Supervisor who complained about a racial statement by a white manger; and reduced by half (causing the loss of health benefits) the hours of an African American licensed physical therapist who wrote a letter complimenting the skills of the discharged Child Care Tech Supervisor. Under the consent decree resolving the case, four individuals shared $400,000 in monetary relief, and the licensed physical therapist's hours were increased to a number restoring her eligibility for health benefits. The decree prohibits defendant from discriminating against any individual because of race and from retaliation.

b. Protecting the Rights of Others

In *EEOC v. Health Help, Inc.* (D. Ariz. April 7, 2006), EEOC alleged that a radiology benefits management service terminated three employees from the Quality Assurance Department in its Phoenix office for opposing discriminatory hiring practices. Defendant, headquartered in Houston, set up a new Quality Assurance (QA) Department in Phoenix, and hired a Vice President for Quality Assessment and Provider Education and two managers. Defendant's Executive Director of Corporate Development subsequently met with the two QA managers, and instructed them not to hire "blacks or Jews" for a particular client. They relayed the directive to the QA Vice President who in turn told the Director of Human Resources that neither she nor her staff would participate in discriminatory practices. Defendant terminated all three employees the following month, telling them their jobs were being eliminated. Under the consent decree resolving this

case, the three QA employees received $450,000 in monetary relief, and defendant was enjoined from retaliation.

In *EEOC v. InTown Suites Management, Inc.* (N.D. Ga. Nov. 21, 2005), EEOC alleged that an extended stay hotel business discharged and otherwise retaliated against a district manager because she opposed discrimination. Prior to emailing defendant's Chief Operating Officer expressing her concerns about the exclusion of minorities from management positions, the district manager, a white woman, had been considered a stellar performer. In the 2 weeks following her email, defendant reprimanded the district manager, criticized her performance, threatened to place her on a performance improvement plan, accused her of disloyalty to the company, and then terminated her. Under the consent decree resolving the case, the former district manager received $317,000 in monetary relief. The decree's affirmative provisions apply to all of defendant's facilities in Georgia. Among other requirements, defendant must institute a nonretaliation policy and advise all employees that it will not retaliate against them for complaining about discrimination. Defendant also must instruct all management and supervisory personnel about the terms of the decree and provide them with annual training on Title VII's equal employment obligations, including nonretaliation.

In *EEOC v. Vulcan Lincoln Mercury, A Division of Serra Automotive Group* (N.D. Ala. Oct. 31, 2005), EEOC alleged that a car dealership in Birmingham, Alabama discharged three managers in the dealership's office because they participated in an internal investigation of an employee's sexual harassment complaint against a manager. Within 3 months after giving testimony supporting the employee's complaint, the three managers were terminated, allegedly as a part of a workforce reduction. They were the only employees discharged, and one of them had been rehired just a month prior to her discharge. Under the consent decree resolving this case, the three employees shared $330,000 in monetary relief. The decree prohibits defendant from taking any adverse action against current or former employee for filing or participating in the investigation of an EEOC charge or for opposing or protesting any practice or policy he or she reasonably believes violates Title VII.

F. *Outreach: Educating the Public*

Outreach and community education continue to be high Commission priorities and Office of General Counsel staff are a significant part of these efforts. In fiscal year 2006, legal staff made presentations at over 900 outreach events addressing more than 36,000 individuals. In this section of the Annual Report we provide a few examples of OGC's educational efforts.

The agency's field legal units have close ties to many community groups and stakeholder organizations. The following are some examples of this involvement. The regional attorney from New York appeared on a "Know Your Rights" panel sponsored by the American Arab Anti-Discrimination Committee. The regional attorney from San Francisco spoke about sexual harassment at the national conference of the National Network to End Violence against Immigrant Women, and an attorney from New York

met with members of the New York State Migrant Education Consortium. An attorney from Houston also spoke about immigrant work rights at a League of United Latin American Citizens (LULAC) program. The regional attorney from Dallas spoke on a panel about national origin and religious discrimination at a conference of the Council on American Islamic Relations. Attorneys from Los Angeles discussed employment discrimination laws at the Freedom Network conference on human trafficking issues, conducted a workshop on hate in the workplace for the California Association of Equal Rights Professionals, discussed discrimination laws at a meeting of the Coalition to Abolish Slavery and Trafficking, and provided training on sexual harassment for Liberas Compesinas, a group that assists agricultural workers.

Essential to a successful outreach program is providing basic information to individuals whose knowledge about EEOC and the civil rights laws is limited. During the fiscal year, an attorney from Los Angeles discussed employment discrimination laws at a Spanish-speaking presentation for the Carpenters' Union. The regional attorney from Dallas conducted a 3-day training session for the employees of a national plastic bottle production plant. The associate regional attorney from Denver discussed the discrimination laws with the Colorado Meat Cutters' Association. An attorney from New York gave an overview of the EEOC to the Arab-American Family Support Center. Attorneys from San Francisco were interviewed about EEOC cases in litigation by Radio Bilingue and a local public broadcasting television station.

Because of the complexities of many aspects of the Americans with Disabilities Act, there is an ongoing demand for information that Commission attorneys are in a unique position to provide. For example, an attorney from Phoenix gave a presentation on accommodating cognitive impairments at the Arizona State Labor Convention. An attorney from Minneapolis presented a primer on the ADA for the Mental Health Association of Minnesota. An attorney from New York spoke about job coaches to Protection and Advocacy for Individuals with Traumatic Brain Injury. Attorneys from Phoenix gave advice on the development of disability discrimination policies at the National Association of ADR Coordinators conference. An attorney from Seattle discussed ADA issues with the Epilepsy Foundation of Idaho.

Commission attorneys frequently meet with employer groups to explain coverage of the federal discrimination laws and the EEOC's processes. For example, attorneys from St. Louis provided an overview of the EEOC to the Missouri Association of School Personnel Administrators, and provided a legal update for the Council on Education in Management. Attorneys from Phoenix provided a legal update for the Arizona Employers' Council. The regional attorney from New York facilitated a workshop on "Minimizing Your Client's Exposure" at the American Conference Institute. An attorney from Miami addressed human resources personnel at a convention of the American Association for Affirmative Action. Attorneys from New York addressed the Connecticut Business and Industry Association and the Restaurant Opportunities Center. The regional attorney from Atlanta explained the EEOC's charge process to a county society of human resource managers, and a trial attorney from Dallas explained the EEOC charge process to the Oklahoma Small Business Development Center. Attorneys from Los Angeles

discussed the discrimination laws with small businesses at several presentations to the President's Advisory Commission on Asian Americans and Pacific Islanders.

Office of General Counsel staff continued their support of the Commission's Youth@Work Initiative, an educational effort directed at teens and their employers. For example, an attorney from Philadelphia spoke with students in vocational programs at Delaware high school about harassment in the workplace. Attorneys from St. Louis and Charlotte also spoke to high school students about employment discrimination laws. Attorneys from New York spoke about the Youth@Work Initiative to several local YMCA and YWCA chapters and to the Partnership for After School Education. An attorney from San Francisco spoke about the Youth@Work Initiative to advocates who assist young workers with job placements, and an attorney from New York gave an interview to *Newsday* about the Initiative.

Commission attorneys regularly speak to national and local bar groups. To give only a few examples, the regional attorney from Chicago delivered the keynote address at the Law Bulletin Seminars' Employment Law Conference, and spoke about disability discrimination at a conference of the Practicing Law Institute. An attorney from Minneapolis gave the keynote address on glass ceiling issues to the Leadership Council of the Minnesota Women Lawyers' Association. Attorneys from New York spoke about discrimination issues affecting immigrants to Greater Boston Legal Services and to the Southern Poverty Law Center. An Assistant General Counsel gave a presentation on American legal developments to the Canadian Association of Statutory Human Rights Agencies. The regional attorney from New York made a presentation on pregnancy discrimination to the American Civil Liberties Union. Attorneys from San Francisco gave presentations on sexual harassment to the Oregon Law Center, the Hispanic National Bar Association, and California Legal Assistance.

Office of General Counsel attorneys are frequently interviewed by national and local media on Commission litigation and employment discrimination issues. To highlight just a few examples, the regional attorney from New York gave a series of interviews to the *Wall Street Journal* about English-only rules, serial sexual harassment, and retaliation. The regional attorney from Phoenix gave an interview to NBC Nightly News on pregnancy discrimination. Attorneys from New York gave interviews to *Newsday* about age and religious discrimination, and gave interviews to Univision and National Public Radio about English-only rules. Attorneys from Dallas gave interviews to CNN and the *Dallas Morning News* about race discrimination cases.

III. Litigation Statistics

A. *Overview of Suits Filed*

In FY 2006, the field legal units filed 371 merits lawsuits: 369 direct suits and 2 actions to enforce conciliation agreements. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes and suits to enforce administrative settlements.) One hundred and thirty-seven of the suits sought

relief for multiple aggrieved individuals. The field legal units also filed 32 actions to enforce subpoenas issued during EEOC investigations.

Merit Filings in FY 2006

	Count
Direct	369
Intervention	0
Administ. Enf.	2
Total	371

234 Individual Suits
137 Class Suits

1. Litigation Workload

The FY 2006 litigation workload (merits cases active at the start of the fiscal year plus merits suits filed during the fiscal year) remained substantial with 976 suits in total

Litigation Workload

	Active	Filed	Workload
FY 2006	605	371	976

2. Filing Authority

With the adoption of the National Enforcement Plan in February 1996, the Commission delegated litigation filing authority to the General Counsel in all but a few areas; in July 1996, the General Counsel redelegated much of his authority to the regional attorneys. Approximately 85% of the cases filed in FY 2006 were authorized by the regional attorneys under their redelegated authority. (Redelegated cases are reviewed by staff in the Office of General Counsel prior to filing.)

FY 2006 Suit Authority

	Count	Percent
Regional Attorney	316	85.2%
Commission	46	12.4%
General Counsel	9	2.4%

3. Statutes Invoked

Of the 371 merits suits filed, 79.2% contained Title VII claims, 13.5% contained ADEA claims, 11.3% contained ADA claims, 2.7% contained EPA claims and 5.9% were filed under multiple statutes. Note: the total percentage exceeds 100% because suits filed

under multiple statutes are also included in the tally of suits filed under the particular statute.

Merit Filings in FY 2006
By Statute

	Count	Percent
Title VII	294	79.2%
ADA	50	13.5%
ADEA	42	11.3%
EPA	10	2.7%
Concurrent	22	5.9%

4. Bases Alleged

As shown in the next table, sex discrimination (44.7 %) and retaliation (32.3%) were the bases alleged most often in suits filed on the merits. Race (21.3%), age (12.4%), disability (10.5%), and national origin discrimination (10.0%) were the next most frequently alleged bases. Note: Total count exceeds suits filed (371) because suits often contain multiple bases.

Bases Alleged in Suits Filed

	Count	Percent
Sex	166	44.7%
Retaliation	120	32.3%
Race	79	21.3%
Age	46	12.4%
Disability	39	10.5%
National Origin	37	10.0%
Religion	24	6.5%
Equal Pay	10	2.7%

5. Issues Alleged

Discharge was an issue in over 64% of the merits suits filed in FY 2006 when constructive discharge is included. Harassment of all varieties was an issue in 43.1% of suits filed and sexual harassment was an issue in 25.6% of suits filed.

Issues Alleged in Suits Filed

	Count	Percent
Discharge	239	64.4%
Constructive Discharge	60	16.2%

Harassment	160	43.1%
Sexual Harassment	95	25.6%
Hiring	50	13.5%
Promotion	22	5.9%
Religious Accommodation	15	4.0%
Reasonable Accommodation For Disability	14	3.8%
Wages	13	3.5%

B. *Suits Filed by Bases and Issues*

1. Sex Discrimination

As shown below, 62.5% of cases with sex as a basis alleged some form of harassment; 36.3% of the cases with sex as a basis alleged some form of discharge.

Sex Discrimination Issues

	Count	Percent
Harassment	105	62.5%
Discharge	61	36.3%
Hiring	20	11.9%
Terms/Conditions	13	7.7%
Wages	7	4.2%

2. Race Discrimination

As shown below, cases with race as a basis had a higher percentage of harassment alleged (43%) than any other issue; race cases alleging discharge were second (37.2%)

Race Discrimination Issues

	Count	Percent
Harassment	37	43.0%
Discharge	32	37.2%
Terms/Conditions	12	13.9%
Promotion	10	11.6%

3. National Origin Discrimination

As shown in the next table, harassment was the most frequently alleged issue in suits with national origin as a basis (51.2%), followed by discharge at 41.5%.

National Origin Discrimination Issues

	Count	Percent
Harassment	21	51.2%
Discharge	17	41.5%
Terms/Conditions	10	24.4%
Hiring	4	9.8%

4. Religious Discrimination

As shown below, discharge was the issue most often alleged with religion as a basis (62.5%) with reasonable accommodation next at 41.7%.

Religious Discrimination Issues

	Count	Percent
Discharge	15	62.5%
Reas. Accom.	10	41.7%
Hiring	5	20.8%
Terms/Conditions	4	16.7%

5. Disability Discrimination

As the following table indicates, discharge was the most frequently alleged issue with disability as a basis (65.1% of all suits filed). Reasonable accommodation was the issue next most often alleged (44.2%). Hiring was the issue in 23.3% of the cases filed with disability as a basis.

Disability Discrimination Issues

	Count	Percent
Discharge	28	65.1%
Reasonable Accom.	19	44.2%
Hiring	10	23.3%
Promotion	2	4.7%

6. Age Discrimination

As shown below, discharge was the most frequently alleged issue with age as a basis (52.2%). Hiring at 21.7% was the next most frequent issue.

Age Discrimination Issues

	Count	Percent
Discharge	24	52.2%
Hiring	10	21.7%

Promotion	5	10.9%
Layoff	4	8.7%

7. Retaliation

Discharge was alleged in 83.3% of the suits filed with retaliation as a basis.

Retaliation Issues

	Count	Percent
Discharge	105	83.3%
Harassment	13	10.3%
Terms/Conditions	11	8.7%

C. *Bases Alleged in Suits Filed from FY 2002 through FY 2006*

As the following table indicates, during the past 5 fiscal years, from FY 2002 through FY 2006, suits alleging discrimination on the basis of sex, female (excluding pregnancy) ranged from 33.4% to 43.5% of suits filed each year by the EEOC. Race discrimination claims ranged from 15.3% to 21.3%; national origin claims from 7.8% to 10.5%; religion claims from 3.9% to 6.5%; disability claims from 11.8% to 12.8%; age claims from 7.5% to 12.4%; and retaliation claims from 32.3% to 37.9%.

Bases Alleged in Suits Filed FY 2002 - 2006

Percent Distribution

FY	Sex(F)	Sex(P)	Sex(M)	Race	Nat. Or.	Relig.	Disab.	Age	Retal.
2002	38.8%	4.8%	6.0%	15.4%	7.8%	6.0%	12.1%	10.2%	35.8%
2003	43.5%	3.1%	1.9%	17.7%	10.5%	5.5%	12.7%	7.5%	36.3%
2004	42.7%	6.3%	3.4%	15.3%	9.7%	4.2%	11.8%	11.8%	37.9%
2005	34.9%	8.1%	3.9%	21.1%	7.8%	3.9%	12.8%	11.2%	35.8%
2006	33.4%	8.6%	3.2%	21.3%	10.0%	6.5%	10.5%	12.4%	32.8%

D. *Suits Resolved*

In FY 2006, the Office of General Counsel resolved a total of 383 merits lawsuits, recovering $44,273,829 in monetary relief.

1. Types of Resolutions and Success Rate

As the table below indicates, of the 383 resolutions of merits suits, 80.2% were by consent decree, 8.4% by settlement agreement, 2.3% by favorable court order, 6.3% by unfavorable court order, and 2.8% were voluntarily dismissed. Over 90% of the FY 2006 merits resolutions represented successful outcomes for EEOC – i.e., were either settlements or favorable court orders.

Types of Resolutions

	Count	Percent
Consent Decree	307	80.2%
Settlement Agreement	32	8.4%
Favorable Court Order	9	2.3%
Unfavorable Court Order	24	6.3%
Voluntary Dismissal	11	2.8%
Total	383	100%

2. Statutes Invoked

Of the 383 merits suits resolved during the fiscal year, 77% contained Title VII claims, 13.1% contained ADEA claims, 13.1% contained ADA claims, 8% contained EPA claims and 4.4% were filed under multiple statutes. Note: the total percentage exceeds 100% because suits resolved under multiple statutes are also included in the tally of suits resolved under the particular statute.

FY 2006 Resolutions by Statute

	Count	Percent
Title VII	295	77.0%
ADEA	50	13.1%
ADA	50	13.1%
EPA	8	2.1%
Concurrent	17	4.4%

As shown below, Title VII suits accounted for more than 77% of all monetary relief obtained; ADEA suits accounted for 11.5%, and ADA suits accounted for 6.3%.

FY 2006 Monetary Relief by Statutes

Statute	Relief (Millions)	Relief Percent
Title VII	$34.2	7.4%
ADEA	$5.1	1.5%
ADA	$2.8	6.3%
Concurrent	$2.1	4.7%
EPA	$0.07	0.1%
Total	$44.2	100%

3. Bases Alleged

As shown in the following table, sex was a basis in 48.6% of the suits resolved, retaliation in 36.6% and race in 17.5%. Disability was a basis in 15.4% of the suits resolved and age in 12.1%. Note: Total count exceeds suits resolved (383) because suits often contain multiple bases.

Bases Alleged in Suits Resolved

	Count	Percent
Sex	186	48.6%
Retaliation	140	36.6%
Race	67	17.5%
Disability	59	15.4%
Age	46	12.1%
National Origin	30	7.8%
Religion	15	3.9%
Equal Pay	6	1.6%

4. Issues Alleged

As shown below, the most frequent issue alleged in suits resolved involved some form of discharge (63.9%). Harassment of some kind was as an issue in 45.4% of the suits resolved and sexual harassment was an issue in 29.5% of suits resolved.

Issues Alleged in Suits Resolved

	Count	Percent
Discharge	245	63.9%
Harassment	174	45.4%
Sexual Harassment	113	29.5%
Hiring	51	13.3%
Terms/Conditions	46	12.0%
Promotion	30	7.8%
Wages	14	3.6%
Reasonable Accom. for Disability	18	4.6%
Religious Accommodation	7	1.8%

E. *Resources*

1. Staffing

Since FY 2002, OGC's field staff has decreased from 353 to 308, with attorney staff decreasing from 229 to 200. The following shows field and headquarters staffing numbers for the last 5 years.

OGC Staffing (On Board)

Year	HQ	All Field	Field Attorneys*
2002	79	353	229
2003	86	332	210
2004	83	318	208
2005	77	311	203
2006	56	308	200

*Includes Regional Attorneys, Supervisory Trial Attorneys, and Trial Attorneys

2. Litigation Budget

In FY 2006, the litigation support budget was $3.48 million. From FY 2002 through FY 2006, the litigation support funding ranged from $2.86 to $3.65 million. The following table shows litigation support figures for the last 5 years.

Litigation Support Funding (Millions)

FY	FUNDING
2002	$2.86
2003	$3.30
2004	$3.36
2005	$3.65
2006	$3.48

F. *Historical Summary: Tables and Charts*

1. EEOC Ten-Year Litigation History: FY 1997 through FY 2006

Litigation Statistics, FY 1997 through FY 2006

	FY97	FY98	FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
Suits										
All Suits Filed	332	414	465	329	428	370	400	421	416	403
Merits Suits	300	374	438	292	388	342	366	387	381	371
Suits with Title VII Claims	182	254	341	236	289	268	298	297	295	294
Suits with ADA Claims	83	87	55	29	66	44	49	46	49	42
Suits with ADEA Claims	42	44	47	33	42	39	27	46	44	50
Suits with EPA Claims	4	10	9	9	14	12	12	5	13	10
Suits filed under multiple statues[1]	11	19	13	14	19	19	19	14	17	22
Subpoena and Preliminary Relief Actions	32	40	27	37	40	28	34	43	35	32
Resolutions										
All Resolutions	243	331	350	440	362	381	381	380	378	418

Litigation Statistics, FY 1997 through FY 2006

	FY97	FY98	FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
Merits Suits	214	295	320	407	321	351	351	346	338	383
Suits with Title VII Claims	132	189	211	315	232	266	275	277	259	295
Suits with ADA Claims	49	73	74	53	48	65	50	43	41	50
Suits with ADEA Claims	38	38	51	41	39	26	35	34	45	50
Suits with EPA Claims	7	4	7	6	15	9	13	9	12	8
Suits filed under multiple statues	12	9	22	8	12	15	21	14	18	17
Subpoena and Preliminary Relief Actions	29	36	30	33	41	30	30	34	40	35
Monetary Benefits ($ in millions)[2]	114.7	95.6	98.7	52.2	49.8	56.2	146.6	168.6	104.8	44.3
Title VII	95	62	49.2	35	33.6	29.2	85.1	158.5	98	34.3
ADA	1.1	2.8	2.9	2.9	2.3	15.1	2.3	2.5	3.4	2.8
ADEA	18	29.8	42.8	13.8	3.1	1.4	57.8	5.4	2.4	5.1
EPA	0	0	0	0.2	0.2	0.2	0	0	0	0
Suits filed under multiple statues[3]	0.5	1	3.8	0.4	10.7	10.3	1.5	2.3	1	2.1

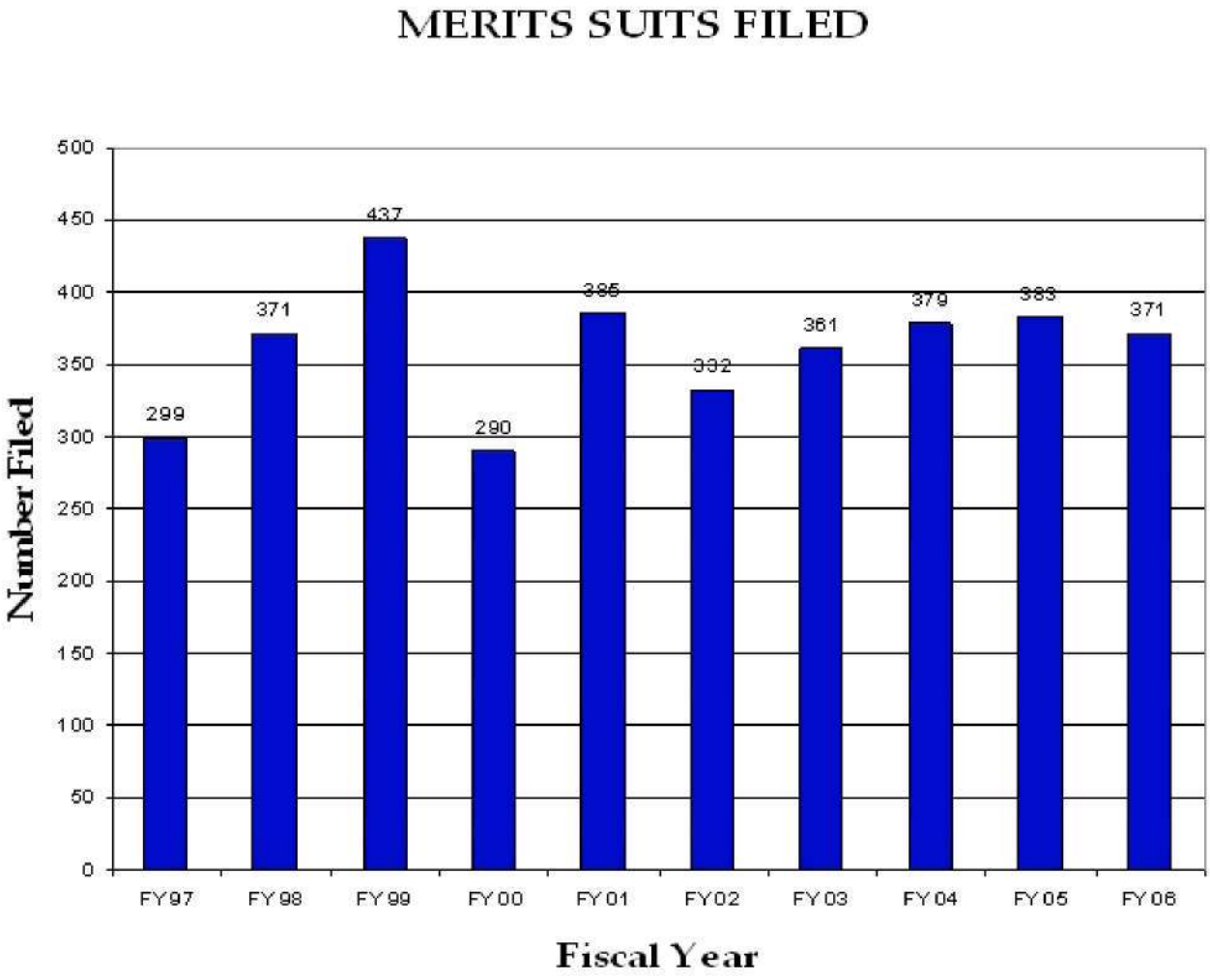
[1.] Suits filed under multiple statutes are also included in the tally of suits filed under the particular statutes.

[2.] The sum of the statute benefits in some years will be less than total benefits for the year due to rounding.

[3.] Monetary benefits recovered in suits filed under multiple statutes are counted separately and are not included in the tally of suits filed under any particular statute.

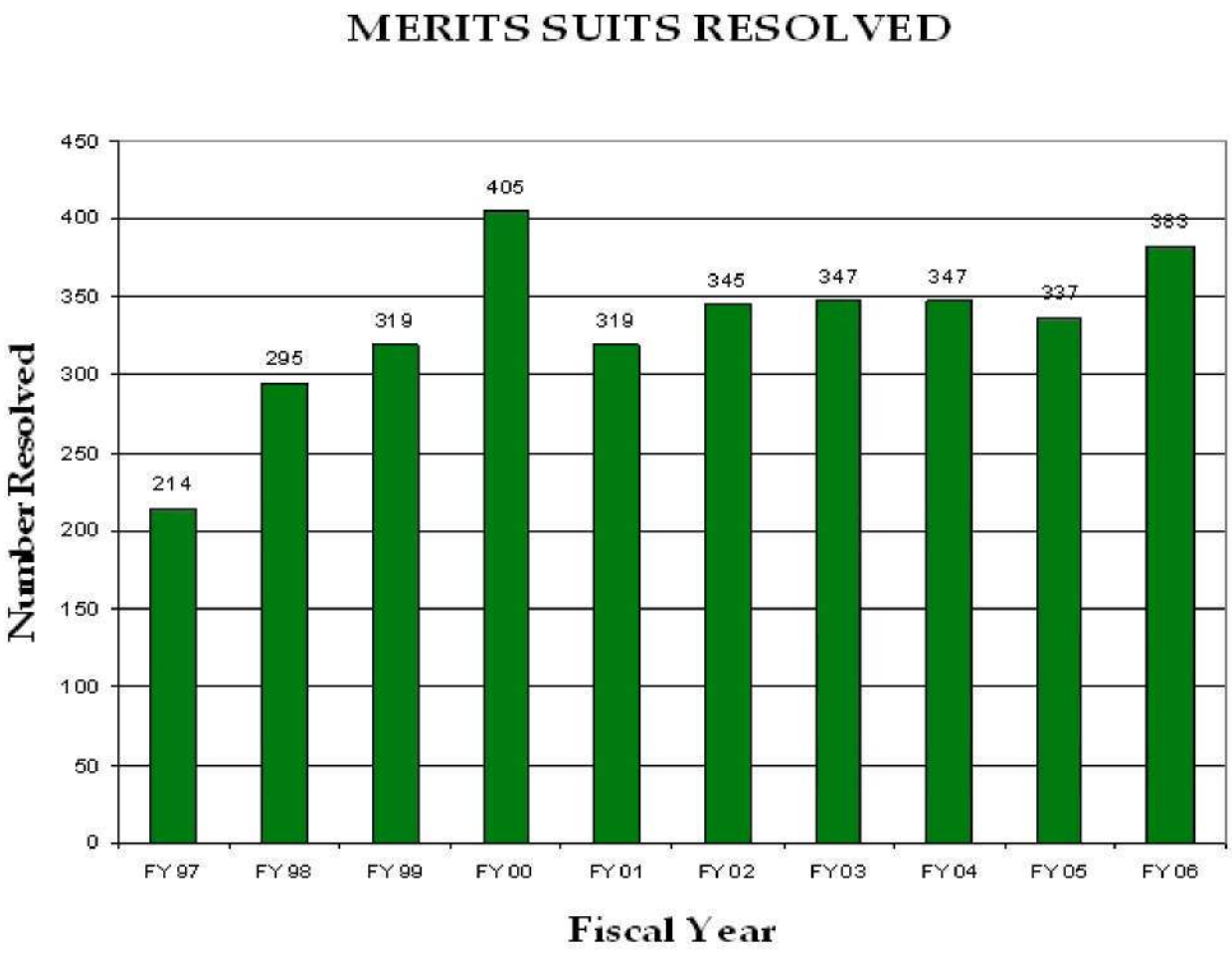
2. Merits Suits Filed FY 1997 through FY 2006

The chart below shows the number of merits suits filed for FY 1997 through FY 2006



3. Merits Suits Resolved FY 1997 through FY 2006

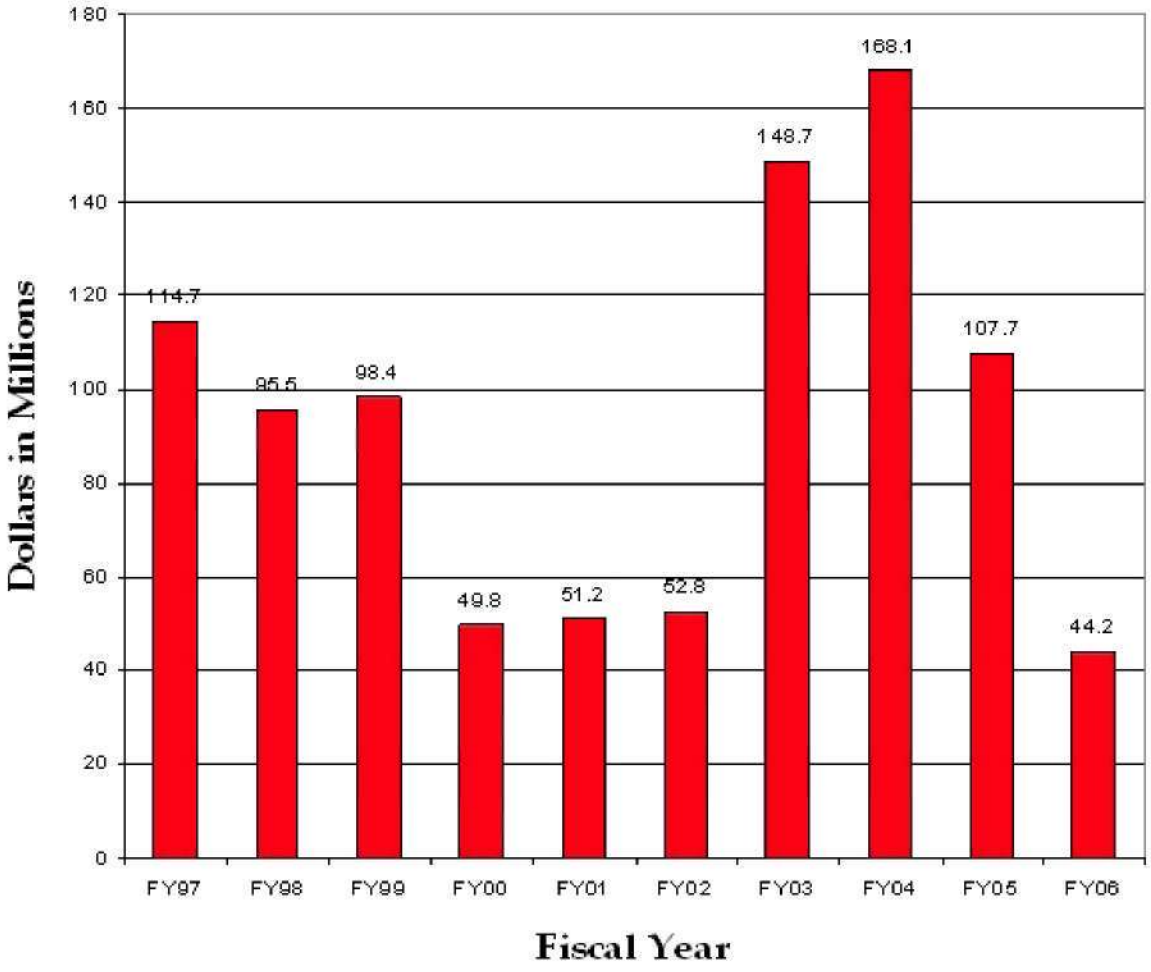
The chart below shows the number of merits suits resolved for FY 1997 through FY 2006.



4. Monetary Recovery FY 1997 through FY 2006

The chart below shows the monetary recovery for FY 1997 through FY 2006.

MONETARY RECOVERY



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* See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Stud. 429 (2004). The federal district court data relied upon in our review focuses on codes 442 and 445 used by the Administrative Office of the United States Courts. These codes include all Title VII, ADA, ADEA, FMLA, and employment-related §1981 and §1983 actions. The federal district court data for non-EEOC cases covers January 2001 through December 2005, and EEOC data covers October 2001 through September 2006.